TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1955

No. 320

GEORGE B. PARR, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 12, 1955
CERTIORARI GRANTED OCTOBER 17, 1955

SUPREME COURT OF THE UNITED STATES

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IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, LAREDO DIVISION

Criminal No. 17065

UNITED STATES OF AMERICA

vs.

GEORGE B. PARR

DESIGNATION OF RECORD ON APPEAL (omitted in printing)

[fol. 3] [Caption omitted]

[fol. 4] IN UNITED STATES DISTRICT COURT, SOUTHERN TEXAS—CORPUS CHRISTI DIVISION

INDICTMENT—Filed November 15, 1954

The Grand Jury Charges:

That on or about the 15th day of March, 1950, within the Corpus Christi Division of the Southern District of Texas and within the jurisdiction of this Court, one George B. Parr, late of San Diego, Texas, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America for the calendar year 1949, by preparing and causing to be prepared, at San Diego, Texas, and by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of Texas, by depositing and causing to be deposited, at the Corpus Christi Division Office, a false and fraudulent income tax return wherein he stated that his net income for said calendar year was the sum of $49,075.04, and that the amount of tax due and owing thereon was the sum of $22,615.39, whereas, as

he then and there well knew, his net income for the said calendar year was the sum of $96,457.96, upon which said net income he owed to the United States of America an income tax of $56,050.46.

[fol. 5] In violation of Section 145 (b), Internal Revenue Code; 26 U.S.C., Section 145. (b).

Count Two

That on or about the 15th day of March, 1951, within the Corpus Christi Division of the Southern District of Texas, and within the jurisdiction of this Court, one George B. Parr, late of San Diego, Texas, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America for the calendar year 1950, by preparing and causing to be prepared, at San Diego, Texas, and by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of Texas, by depositing and causing to be deposited, at the Corpus Christi Division Office, a false and fraudulent income tax return wherein he stated that his net income for said calendar year was the sum of $70,599.16, and that the amount of tax due and owing thereon was the sum of $38,312.60, whereas, as he then and there well knew, his net income for the said calendar year was the sum of $112,114.46, upon which said net income he owed to the United States of America an income tax of $70,570.76.

[fol. 6] In violation of Section 145(b), Internal Revenue Code; 26 U.S.C., Section 145(b).

Count Three

That on or about the 17th day of March, 1952, within the Corpus Christi Division of the Southern District of Texas, and within the jurisdiction of this Court, one George B. Parr, late of San Diego, Texas, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America for the calendar year 1951, by preparing and causing to be prepared, at San Diego, Texas, and by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of Texas, by

depositing and causing to be deposited, at the Corpus Christi Division Office, a false and fraudulent income tax return wherein he stated that his net income for said calendar year was the sum of $44,698.31, and that the amount of tax due and owing thereon was the sum of $22,628.23, whereas, as he then and there well knew, his net income for the said calendar year was the sum of $70,713.86, upon which said net income he owed to the United States of America an income tax of $42,589.37.

In violation of Section 145(b), Internal Revenue Code; [fol. 7] 26 U.S.C., Section 145(b).

(S.) Thomas Woodson, Foreman of the Grand Jury.
(S.) James T. Down, Assistant United States Attorney, JTD:sep.

IN UNITED STATES DISTRICT COURT, SOUTHERN TEXAS, CORPUS CHRISTI DIVISION

PROCEEDINGS OF DECEMBER 1, 1954 ON ARRAIGNMENT AND PLEA

[Caption omitted]

APPEARANCES:

Counsel for Government: Mr. Malcolm R. Wilkey, United States Attorney, Houston, Texas.

Counsel for Defendant: Messrs. Looney, Clark & Moorehead, 1020 Brown Bldg., Austin, Texas, by Mr. Everett Looney and Mr. Thomas James.

Be it remembered that on the 1st day of December, A. D. 1954, the following proceedings were had in the above styled cause, pending in the said Court, before His Honor, James V. Allred, Judge of said Court, presiding, the Court sitting in Corpus Christi, Texas:

[fol. 8] Morning Session—December 1, 1954

Colloquy Between Court and Counsel

The Court: Call the next case, Mr. Clerk.

The Clerk: No. 6011, United States vs. George B. Parr.

The Court: Come around, gentlemen. Of counsel, Mr. Wilkey for the United States Attorney's office, and Mr. Everett Looney——

Mr. Looney: Everett Looney of Austin, Texas, and Thomas James of Austin, Texas.

The Court: All right. Have you gentlemen been furnished with a copy of the indictment?

Mr. Looney: Yes, sir.

The Court: Familiar with it; what will be the plea, Counsel?

Mr. Looney: Your Honor, if I may say a word——

The Court: Counsel, what I'm getting at is, ususally, unless it is a plea of guilty, they waive formal arraignment and reading of the indictment and——

Mr. Looney: We are going to do that, Your Honor, except if I might say a word or two.

The Court: Very well.

Mr. Looney: I can see now that the defendant must have [fol. 9] a bill of particulars. Now, before pleading on the arraignment, I wanted to mention that, because either I want to request that the arraignment be postponed or put counsel on notice, and the Court, that we are going to have to ask more than the ten days allowed subsequent to arraignment. I just wanted to make that statement.

If I understand it correctly, the rules require any motion for a bill of particulars to be within ten days unless the time is extended for good cause, and I understand further that the arraignment could be postponed; we are not asking that that be done, except we do want to make ourselves clear right at the beginning that the indictment is in the most broad, general terms, and we're going to have to have some particulars, at least we are going to have to request the Court to order the bill of particulars.

The Court: Well, in all these—most any of these cases that come up, in fact without exception, I have permitted

counsel to enter a plea, subject to motions to be filed within a given time, and I see no reason why that shouldn't be done in this case, to enter your plea, subject to the filing of certain motions. Now if you will indicate how long a time you wish, I will enter an order granting you reasonable time [fol. 10] within which to file any and all motions.

Mr. Looney: All right, sir. Then the Defendant waives the reading of the indictment and pleads not guilty.

The Court: Very well. Now how long would you like within which to—you may note on there, "Defendant waived formal arraignment and entered a plea of not guilty, subject to his right to file motions—" and I'll give you the date in just a moment. Now how long would you like within which to file your motions?

Mr. Looney: Your Honor, the indictment in this case was returned, if I recall, November the 18th. Is that the correct date?

Mr. Wilkey: I believe that is correct, Your Honor.

Mr. Looney: And we would like to have—this is the first of December, and Christmas season is coming on, we would like to have until about the middle of January, if that is not an unreasonable request.

The Court: Well, I feel that you ought to be able to make your motion for a bill of particulars sooner than that. If there are any other motions, I think that you ought to, in [fol. 11] order that Counsel will have time to reply and file any briefs that are necessary, if any,—what we usually do, I set a date within which motions are to be filed, and an original brief by one side, and grant the other side time to reply and file briefs, and then for a reply brief, if necessary, in case the motions are then submitted. It may be that there will be no opposition to the filing of a motion for a bill of particulars.

Mr. Looney: We are in this shape, if that's an unreasonable request, of course, I don't want to push it, but necessarily, we—I was engaged in some other matters at the time this bill of indictment was returned, at the time Mr. Parr consulted me, and the indictment is, I suppose, as broad as it could be put.

Mr. Wilkey: The indictment is in the usual form, Your Honor,—

Mr. Looney: That's correct,——

Mr. Wilkey: —in these income tax cases.

Mr. Looney: That's correct, Your Honor. I'm not raising any question—the usual form is rather broad, and if January the 15th would not be—I mean, it would be too long, why, just whatever time the Court feels like I should be—— [fol. 12] The Court: I have never tried one of these income tax cases; I haven't seen the indictment here; I understand that's what this is; but we had one submitted at Fort Worth in which a bill of particulars was ordered by the Court, and I rather assume that if it is in the usual language, that a bill of particulars would probably be in order, but I'm not passing on it in advance.

Mr. Looney: We have several motions, Your Honor,——

The Court: Well,——

Mr. Looney: I know the Christmas season's coming, and——

The Court: Well, I've been working in November. This is the first of December, isn't it? I have been dating everything in November. Well, I'll give you until the first Monday in January to file your motions, and any memorandum brief you wish to file. How long would the Government like to reply?

Mr. Wilkey: If the Defense is going to have from December 1, and of course they have seen a copy of the indictment prior to this time,—December 1 to January the 3rd, I believe it would be, we would like 15 days thereafter, Your Honor. [fol.13] The Court: All right. All motions to be filed, together with memorandum or brief, by the Defendant, on or before January 3rd. Reply briefs by the Government by January 17th. That will give you two weeks. Is that all right?

Mr. Wilkey: Yes, Your Honor.

The Court: And,——

Mr. Wilkey: On that, I have in mind that Counsel has announced that he is going to ask for a bill of particulars and also other motions. Of course we do not know what other motions, what nature or scope that he will have, that he will file, and if they are of the nature which, coupled with the bill of particulars, would require more time, we would then

—might have to ask the Court for more time after we see the nature of the motions filed.

The Court: Well, that frequently occurs, and Counsel will learn. I have extended time in many cases, and so if you get into a jam, why, you can write me a letter about it and send Counsel a copy and I'll have it noted on the docket. Now then, any reply brief on your part, Counsel for the Defendant, will be filed by the 24th of January. I'll give you a week to reply,——

[fol. 14] Mr. Looney: All right, sir.

The Court: —at which time, unless extended by the Court, the motions will be submitted, whatever motions are filed.

Now, subject to action on the motions and so on, I can't set any definite time for trial at this time, but it will probably be in March if—some time in March, depending, of course, on these motions.

Now, gentlemen, perhaps this is not necessary, but—I know both Counsel in this case—but I'm going to direct your attention to Rule 17 of the Canon of Ethics of the Texas State Bar, dealing with public statements by Counsel about cases pending in court, counsel on either side. I'm sure both of you agree with the spirit of that rule, and the place to try this case is in the courthouse here.

Mr. Looney: That's right. I appreciate Your Honor doing it, because sometimes the newspaper reporters don't appreciate a lawyer's position.

The Court: Well, there happens to be a rule of the Texas Bar, I think promulgated by the Legislature and the Supreme Court,——

Mr. Wilkey: I hope the Court has observed that in spite [fol. 15] of considerable and unprecedented advance publicity in this case, that Government Counsel hitherto have observed to the full that——

The Court: I'm not inferring anything to the contrary about either one, but I just, out of an abundance of precaution, feel that I should call attention to that, and that I expect Counsel on both sides to comply with it, because we've got to try all these cases here in the courtroom, on the evidence here. All right.

Mr. Looney: Thank you, sir.
Mr. Wilkey: Thank you, sir.

Reporter's Certificate to foregoing Transcript omitted in printing.

[fol. 16] In United States District Court, Southern Texas, Corpus Christi Division

Memorandum Opinion, Kennerly, J.—April 27, 1955—(Filed April 28, 1955)

Malcolm R. Wilkey, United States Attorney, and James T. Dowd, Assistant United States Attorney, of Houston, Texas; for Plaintiff.

Everett J. Looney, of Austin, Texas, Thomas James of Austin, Texas, Marvin K. Collie, of Houston, Texas, and Clyde L. Wilson, Jr., of Houston, Texas; for Defendant.

April 27, 1955.

[fol. 17] Memorandum

The Defendant, George B. Parr, is charged by indictment in this court with having made false and fraudulent income tax returns for the years 1949, 1950 and 1951.

There have been assigned to me for hearing four motions in the case. These have been heard under Local District Court Rule 25, and are disposed of as follows:

1. *Defendant's Motion for Bill of Particulars filed January 3, 1955, under Rule 7(f) of the Federal Rules of Criminal Procedure, reading as follows:*

> "(f) Bill of Particulars. The court for cause may direct the filing of a bill of particulars. A motion for a bill of particulars may be made only within ten days after arraignment or at such other time before or after arraignment as may be prescribed by rule or order. A bill of particulars may be amended at any time subject to such conditions as justice requires."

(a) I think the Government's answers to Paragraphs I, II, III and IV, of Defendant's Motion for Bill of Particulars [fol. 18] require that such paragraphs of such Motion be, and they are denied.

(b) I think however, that Paragraph V of Defendant's Motion for Bill of Particulars should be granted, but *only to the extent set forth in Pargaraph V of the Government's Answer to Defendant's Motion.* But, if, after the Government has made the disclosures set forth in said Paragraph V of its Answer, the Defendant is still unable to properly prepare his defense, he may again be heard in this matter.

2. *Defendant's Motion, filed January 3, 1955 for Discovery and Inspection under Rule 16 of the Federal Rules of Criminal Procedure, as follows:*

> "Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the Government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photo- [fol. 19] graphs and may prescribe such terms and conditions as are just."

(a) Defendant moves for discovery and inspection of all "books, papers, documents, transcripts and tangible objects" relating to this case and in the "possession of Plaintiff" *which were obtained from the Defendant or belonged to the Defendant or were obtained from others by seizure or process.*

Paragraphs I, II and III of the Government's Answer are as follows:

"I

The Government does not have in its possession any books, papers, documents, transcripts or tangible ob-

jects relating to the within cause obtained from the defendant.

II

The Government does not have in its possession any books, paper, documents, transcripts of tangible objects relating to the within cause belonging to the defendant.

III

The Government does not have in its possession any transcripts relating to the within cause obtained from others by seizure or process."

[fol. 20] Defendant's Motion is denied as to the matters set forth in Paragraphs I, II and III of the Government's Answer.

(b) The Government, in Paragraphs IV and V of its Answer, further replies to Defendant's Motion as follows:

"IV

The Government does have in its possession certain books, papers, documents and tangible objects relating to the within cause which were obtained from others by seizure or process.

V

With reference to those items in Paragraph IV above, the Government stands ready to permit the Defendant and his attorneys, under proper supervision and at a time and place designated by the Court, to inspect, copy or photograph these books, papers, documents or tangible objects relating to the within cause provided that:

(a) Defendant specifies which particular books, papers, documents or tangible objects he wishes to inspect, copy or photograph; and

(b) Defendant establishes that the above items were [fol. 21] obtained from others by seizure or process; and

(c) Defendant establishes that such items are material to the within cause; and.

(d) Defendant establishes that such request then

made is necessary to the proper preparation of the defendant's defense; and

(e) Defendant establishes that such request then made is reasonable."

If Subparagraphs (a), (b), (c), (d) and (e) of Paragraph V of the Answer of the Government be sustained, Rule 16 would be made noneffective. Defendant cannot specify what particular matter there is in the possession of the Government until he is awarded discovery and inspection. The Government in its above-quoted Answer admits that such matter was seized from others and it would be idle to require Defendant to prove it. Presumably such matter is material to the within cause or the Government would not have seized it. Defendant cannot know what such matter is until he sees and inspects it, and cannot until then say whether it is necessary for the proper preparation of his defense, or whether his request is reasonable.

Discovery and inspection under Rule 16 should be and is granted without the conditions which the Government [fol. 22] seeks to impose in Paragraphs IV and V of its Answer.

3. *Defendant's Motion for Subpoena Duces Tecum for Honorable Malcolm Wilkey, United States Attorney, under Rule 17(c) of the Federal Rules of Criminal Procedure, reading as follows:*

"(c) For Production of Documentary Evidence and Objects. A Subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys."

In Bowman Dairy Co. vs. United States, 341 U.S. 219, a case similar to this, it is said that Rule 17(c) is chiefly to [fol. 23] expedite preparation for the trial. It is also said:

"Rule 16 deals with documents and other materials that are in the possession of the Government and provides how they may be made available to the defendant for his information. In the interest of orderly procedure in the handling of books, papers, documents and objects in the custody of the Government accumulated in the course of an investigation and subpoenaed for use before the grand jury and on the trial, it was provided by Rule 16 that the court could order such materials made available to the defendant for inspection and copying or photographing. In that way the control and possession of the Government is not disturbed. Rule 16 provides the only way the defendant can reach such material so as to inform himself.

But if such materials or any part of them are not put in evidence by the Government, the defendant may subpoena them under Rule 17(c) and use them himself. It would be strange indeed if the defendant discovered some evidence by the use of Rule 16 which the Government was not going to introduce and yet could not require its production by Rule 17(c). There may be [fol. 24] documents and other materials in the possession of the Government not subject to Rule 16. No good reason appears to us why they may not be reached by subpoena under Rule 17(c) as long as they are evidentiary. That is not to say that the materials thus subpoenaed must actually be used in evidence. It is only required that a good-faith effort be made to obtain evidence. The court may control the use of Rule 17(c) to that end by its power to rule on motions to quash or modify.

It was not intended by Rule 16 to give a limited right of discovery, and then by Rule 17 to give a right of discovery in the broadest terms. Rule 17 provided for the usual subpoena ad testificandum and duces tecum, which may be issued by the clerk, with the provision

that the court may direct the materials designated in the subpoena duces tecum to be produced at a specified time and place for inspection by the defendant. Rule 17(c) was not intended to provide an additional means of discovery. Its chief innovation was to expedite the trial by providing a time and place before trial for the inspection of the subpoenaed material. United States [fol. 25] v. Maryland & Virginia Milk Producers Assn., 9 F.R.D. 509. However, the plain words of the Rule are not to be ignored. They must be given their ordinary meaning to carry out the purpose of establishing a more liberal policy for the production, inspection and use of materials at the trial."

In view of defendant's Motion for Bill of Particulars under Rule 7(b), and his Motion for Discovery under Rule 16, I think it would be premature to at this time grant Defendant's Motion for subpoena duces tecum. It may or may not be needed in the preparation for the trial. Defendant's Motion for Subpoena Duces Tecum should and will remain on the Motion Calendar to await the outcome of Defendant's Motions for Bill of Particulars and Discovery.

4. *Defendant's Motion to Change the Venue in this case from the Corpus Christi Division to the Laredo Division of the Court under Rule 21(a) of the Rules of Criminal Procedure, reading as follows* (italics mine):

"(a) For Prejudice in the District or Division. The court *upon motion of the defendant* shall transfer the proceeding as to him to *another district or division* if [fol. 26] the court is satisfied that there exists in the district or division where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial in that district or division."

(a) The Government opposes the Defendant's Motion. The pleadings, briefs, affidavits, exhibits, etc., filed and brought forth by both parties constitute a large record which I have examined and considered.

The cases which the Government cites,[1] many of which Defendant also cites, have been examined. They are helpful.

[fol. 27] They hold generally that a defendant in a criminal case has the burden of proof and must make a proper showing under the statute or rules in order to obtain a change of venue to another district or division. Each case cited shows the facts in that case and points out why such facts do or do not authorize or require such a change. In most of them a change of venue is denied. They also discuss newspaper publicity, etc., as a ground for a change of venue. In all of them it is held that a change of venue is in the sound discretion of the court and must be determined on the facts of each particular case.

(b) Originally Defendant's Motion was submitted on many affidavits and many newspaper clippings from certain Corpus Christi newspapers filed and offered by Defendant, and a few affidavits filed and offered by the Government. Later the Government asked and was granted permission to and has also filed and offered many affidavits. All these I have carefully studied. They, along with other portions of [fol. 28] the record, show the geographic location, population, etc., of the Corpus Christi and Laredo Divisions of the Court and of the county and town in which Defendant re-

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[1] Shockley v. United States, 166 F.(2d) 704 (C.A. 1949), certiorari denied 334 U.S. 830; Dennis v. United States, 171 F.(2d) 986, certiorari granted 337 U.S. 954; United States v. Mellor (D.C. Neb., 1946), 71 F. Supp. 53, affirmed 160 F. (2d) 757, certiorari denied 331 U.S. 848; Kott v. United States (5 C.A. 1949); 163 F.(2d) 984; United States v. Florio, 13 F.R.D. 296 (S.D. N.Y. 1952); United States v. Lattimore, 112 F. Supp. 507 (S.D. D. C. 1953); Kerston v. United States, 161 F.(2d) 337 (10 C.A. 1947), certiorari denied 331 U.S. 851; United States v. Carper, et al., (D.C. D.C. 1953) 13 F.R.D. 483; United States v. Moran (2 C.A. 1952), 199 F.(2d) 107; Shushan v. United States, (5 C.A. 1941) 117 F.(2d) 110; Allen v. United States (7 C.A. 1924), 4 F.(2d) 688; United States v. Mesarosh (D.C. W.D.Tenn. 1952), 13 F.R.D. 180.

sides. They also show the extent of circulation and places of circulation of the newspapers mentioned.

Many different opinions, viewpoints and ideas are reflected by such affidavits. Apparently many of the persons making them are not at all familiar with, or overlooked the fact, that the Court must follow the method fixed and required by law in selecting, summoning, and empaneling a jury in this case. Some of them apparently were so uninformed about the law and court procedure that they erroneously regarded the Motion by Defendant for a change of venue as a reflection on the people of the Corpus Christi Division, etc. Some took sides for or against the Defendant. A preponderance of the evidence reflected by such affidavits—and I have no doubt on the subject and find—that there exists in the Corpus Christi Division of the Court so great a prejudice against Defendant that he can not obtain a fair and impartial trial in this case in such division.

Regardless of their opinions, view, or ideas, substantially all of the persons who made such affidavits mention or refer to the publication of many articles about Defendant in [fol. 29] two newspapers published at Corpus Christi with large circulations in the Corpus Christi Division. Defendant has brought and offered in evidence clippings, etc., of a very large number of these articles or publications, extending over a period of several years and on down, which I have studied. I do not undertake to go into details about them, they speak for themselves. They are simply in evidence here and it is not within the province of the Court to either condemn or justify them. It is sufficient to say that the Defendant has therein been given, during recent years, much publicity, generally very unfavorable and sometimes most unfavorable. Such publications, generally with prominent headlines, are directly or indirectly with respect to Defendant or persons closely associated or said to be associated with him, and concern political matters, elections, law enforcement, taxation, etc., generally and in the town of San Diego, and in Duval County, where Defendant resides, and in some adjoining counties. They are also with respect to the killing at night of a young man at Alice, Texas, in connection with which Defendant and per-

sons associated, or claimed to be associated, with Defendant are mentioned. Also with respect to the stationing of Texas Rangers in Duval County, the investigation by the [fol. 30] Attorney General of Texas and others of Defendant and associates, and the affairs of Duval County and the enforcement of the law in such county. Also with respect to the impeachment of certain judicial and other officers thereof. Also with respect to many lawsuits filed on behalf of the state of Texas and the United States and others against Defendant and/or those associated with him. Reference is made to the clippings for full particulars. These publications whether standing alone or when considered in connection with such affidavits, support, strengthen and confirm my view that there is so great a prejudice against Defendant in the Corpus Christi Division that he cannot obtain a fair and impartial trial there in this case.

(c) This brings us to the question of where this case should be sent for trial. I discuss the suggestions shown in the Record.

I think it is clear that Rule 21(a) hereinbefore quoted must be construed in the light of the Sixth Amendment to our Federal Constitution, as follows (italics mine):

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the *State and district wherein the crime shall* [fol. 31] *have been committed*, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defence."

The construction placed upon this Amendment has uniformly been that unless a defendant in a criminal case *waives his right* to be tried in the district in which the crime was committed, the case cannot be lawfully sent to another district for trial.

The offenses with which Defendant is charged are alleged in the indictment to have been committed in this district and this case must be tried in this district *unless the Defendant has waived his right in that respect.* An examina-

tion of the Record and particularly Defendant's Motion, show definitely that he has not done so. The holding here then must be, and is, that this Court is without power to transfer this case to any other district.

I think it is clear that Rule 21(a) hereinbefore quoted, and Rules 18 and 19 of the Federal Rules of Criminal Procedure, must be construed together. Rules 18 and 19 are [fol. 32] as follows (italics mine):

"Rule 18. District and Division:

Except as otherwise permitted by statute or by these rules, the prosecution *shall be had* in a district in which the offense was committed, but if the district consists of two or more divisions the trial shall be had in a division in which the offense was committed.

Rule 19. Transfer within the District.

In a district consisting of two or more divisions the arraignment may be had, a plea entered, the trial conducted or sentence imposed, *if the defendant consents*, in any division and at any time."

Defendant is charged in the indictment with having committed such offenses in the Corpus Christi Division of the Court, and under Rules 18 and 19 must be tried there unless he has, as provided in Rule 19, *consented* to a trial in some other division.

An examination of the Record and Defendant's Motion shows definitely that in filing and presenting his Motion under Rule 21(a) he has consented, as is his right, to a trial *only* in the Laredo Division. In fact, Defendant says in his brief, "We wish to be clearly understood that if the [fol. 33] case is not to be transferred to Laredo we prefer that it remain in Corpus Christi."

It is, therefore, under the law not within the power of the Court to transfer the case to either the Houston, Galveston, Victoria or Brownsville Division, but only to the Laredo Division.

Because of this view of the law I do not deem it necessary to decide, and because the information in the Record as to

conditions in the Houston, Galveston, Victoria and Brownsville Divisions is very meager, I do not deem it proper to decide the questions raised as to those divisions.

(d) The Government raises another question.

As I understand the Government's presentation of these matters it did not, when the case was first submitted, claim that it could not obtain a fair and impartial trial at the Laredo Division, nor does it do so now. It says in its Brief filed (italics mine):

> "That the Government would be under a *severe handicap* in prosecuting this defendant in the Laredo Division."

Later in its brief it modified such claim. It offers with its brief a large number of affidavits, about which affidavits it [fol. 34] says in its brief (italics mine):

> "The affidavits also show that the Government *might be* under a severe handicap in prosecuting this particular defendant in the Laredo Division, etc."

However, because of such claimed handicap the Government insists that the case be transferred to a division other than Laredo.

I have already discussed the lack of power in the Court to do so. I have also pointed out the state of the record with respect to conditions in the Houston, Galveston, Victoria and Brownsville Divisions.

But I have studied the briefs and affidavits of both the Government and Defendant with respect to conditions in the Laredo Division. The Government's affidavits show that certain conditions are believed to exist. Defendant's affidavits show that it is believed that they do not exist. No overt acts are alleged or shown. Apparently there exists a political controversy of long standing at Laredo, and many, or some of those making the affidavits for the Government, and many or some of those making them for the Defendant are in different political camps or hold radically different political views. The two groups, or [fol. 35] some of them, seem to now see each other "through a glass darkly". It might be said facetiously that they

seem to engender "more heat than light". Basing my findings, as I must, wholly on all the affidavits I do not think that the evidence shows that the Government either will or might "be under a severe handicap" in the prosecution of this case as claimed. I find to the contrary.

(c) My conclusion is that the Motion of the Defendant as made should be granted and the venue of the case should be changed from the Corpus Christi Division to the Laredo Division.

Let appropriate orders be drawn and presented in accordance with Paragraphs 1, 2, 3 and 4 hereof.

(S.) T. M. Kennerly, United States District Judge.

I concur.

(S.) James Allred, Judge.

IN UNITED STATES DISTRICT COURT, SOUTHERN TEXAS, CORPUS CHRISTI DIVISION

MOTION OF THE UNITED STATES TO DISMISS THE INDICTMENT UNDER RULE 48, WITH ATTACHED COPY OF TELEGRAM DATED MAY 3, 1955, TO MALCOLM R. WILKEY, UNITED STATES ATTORNEY, FROM H. BRIAN HOLLAND, ASST. ATTORNEY [fol. 36] GENERAL, AND A COPY OF THE INDICTMENT RETURNED BY THE WESTERN DISTRICT OF TEXAS, CRIMINAL 20825, ATTACHED—Filed May 4, 1955

Pursuant to Rule 48 of the Federal Rules of Criminal Procedure and by leave of Court endorsed hereon the United States Attorney for the Southern District of Texas hereby dismisses the indictment against defendant George B. Parr.

(S.) Malcolm R. Wilkey, United States Attorney.

Leave of Court is granted for the filing of the foregoing dismissal.

——, United States District Court.

MRW:LB.

TELEGRAM

Teletype—Rush

Washington, D. C., May 3, 1955, (9:17 A.M., EST)
Malcolm R. Wilkey,

C/O U.S. Attorney,
San Antonio, Texas.

[fol. 37] You are Authorized to Dismiss Indictment Pending in Southern District of Texas against George B. Parr for Violations of Section 145(b) Internal Revenue Code 1939 if and when Indictment Returned in Western District.

H. Brian Holland, Assistant Attorney General.

Rec'd 8:45 A.M., May 3, 1955, Tel/fwe

IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF TEXAS

CR. No. 20825

UNITED STATES OF AMERICA

vs.

GEORGE B. PARR

INDICTMENT

The Grand Jury Charges:

That on or about the 15th day of March, 1950, within the Austin Division of the Western District of Texas, and within the jurisdiction of this Court, one George B. Parr, late of San Diego, Texas, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America for the calendar year 1949, by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of Texas, at Austin, Texas, a false and fraudulent income tax return wherein he stated [fol. 38] that his net income for said calendar year was the sum of $49,075.04, and that the amount of tax due and owing

thereon was the sum of $22,615.39, whereas, as he then and there well knew, his net income for the said calendar year was the sum of $96,457.96, upon which said net income he owed to the United States of America an income tax of $56,050.46.

In violation of Section 145(b), Internal Revenue Code; 26 U.S.C., Section 145 (b).

Second Count

That on or about the 15th day of March, 1951, within the Austin Division of the Western District of Texas, and within the jurisdiction of this Court, one George B. Parr, late of San Diego, Texas, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America for the calendar year 1950, by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of Texas, at Austin, Texas, a false and fraudulent income tax return wherein he stated that his net income for said calendar year was the sum of $70,599.16, and that the amount of tax due and owing [fol. 39] thereon was the sum of $38,312.60, whereas, as he then and there well knew, his net income for the said calendar year was the sum of $112,114.46, upon which said net income he owed to the United States of America an income tax of $70,570.76.

In violation of Section 145(b), Internal Revenue Code; 26 U.S.C., Section 145(b).

Third Count

That on or about the 17th day of March, 1952, within the Austin Division of the Western District of Texas, and within the jurisdiction of this Court, one George B. Parr, late of San Diego, Texas, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America for the calendar year 1951, by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of Texas, at Austin, Texas, a false and fraudulent income tax return wherein he stated that his net income for said calendar year was the sum of

$44,698.31, and that the amount of tax due and owing thereon was the sum of $22,628.23, whereas, as he then and there well knew, his net income for the said calendar year was the sum of $70,713.86, upon which said net income he [fol. 40] owed to the United States of America an income tax of $42,589.37.

In violation of Section 145(b), Internal Revenue Code; 26 U.S.C., Section 145(b).

(S.) G. Bedel Moore, Foreman of the Grand Jury,
(S.) Russell B. Wine, United States Attorney.

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF TEXAS, CORPUS CHRISTI DIVISION

STATEMENT OF REASONS FOR DISMISSAL (United States)—Filed May 4, 1955

To the Honorable Judge of Said Court:

The United States has herewith filed a dismissal of the above styled cause in the usual form, subject to leave of Court being granted. Such dismissal has been filed on the instructions of and authority from the Attorney General of the United States, as shown by copy of telegram attached to the dismissal. As reason for such dismissal, we wish to advise the Court of the Following:

On May 3, 1955, an indictment against the defendant George B. Parr was returned by a Federal Grand Jury at San Antonio, Texas, said indictment charging the defendant in three counts with the same identical offense, as charged [fol. 41] by the indictment in the instant cause. Said indictment lies in the Austin Division of the Western District of Texas, being Criminal Action No. 20825, a copy of which is attached to the dismissal.

It is the duty of the Attorney General to determine in which District prosecution should be had, if prosecution lies in more than one District. It frequently happens that an indictment is brought subsequently in a second District and the original indictment in the first District dismissed. Where this situation exists, the courts recognize the duty

of the Attorney General and grant leave to dismiss the first indictment. U. S. v. Bryson, 16 FRD 453 (D. C. Cal. 1953).

As this Court knows, in income tax evasion cases venue may lie in either the district in which the tax return was filed, or the district which is the residence of the taxpayer. If trial is had in the district of the residence of the taxpayer, which is not the district in which the return was filed, the Government must necessarily bear an extra burden of proof in establishing that acts directed toward evasion of the tax took place in the district of residence. This is a burden which the Government does not have to bear if the trial is [fol. 42] had in the district wherein the return was filed, as the filing of the return is in itself an act sufficient to confer jurisdiction and establish venue. The Attorney General therefore by initiating prosecution in the Austin Division of the Western District, wherein the taxpayer Parr's return was filed, has thus chosen to bring the action where it unquestionably lies and where the Government would not be put to the additional burden of proving the exact situs of acts of the taxpayer directed toward evasion of tax, other than the filing of the return itself. The Government therefore by bringing the prosecution in the Western District thus avoids a risk which is necessarily inherent in any prosecution in the Southern District.

These problems of proof and venue have of course been present in this case from the beginning, and the decision to initiate prosecution originally in the Southern District of Texas was based on the evaluation of this and many other factors. At the present time, because of new factors introduced in the situation, the Attorney General believes that prosecution should be had in the Western District of Texas and has initiated action accordingly.

Among the recent factors weighing in the over-all appraisal of where prosecution should be had should be men- [fol. 43] tioned the recent decision of the Court to transfer venue from Corpus Christi to Laredo in the Southern District of Texas. This means that trial will be had in a division in which neither the taxpayer lives nor the Government chose originally to bring prosecution, and thus establishes a set of circumstances which was never in the contemplation of Government counsel at the time the

original prosecution was brought in the Southern District of Texas.

The decision of the Attorney General to initiate prosecution in the Western District of Texas in no way is to be construed as an evasion of the ruling of the Court transferring venue from Corpus Christi to Laredo. In argument on the motion for transfer of venue the defendant was insistent on a change of venue to Laredo and nowhere else, and failing that wished venue to remain in Corpus Christi. The Court in its opinion recognized the narrowness of the choice which confronted it under the law as it construed it and the nature of defendant's motion. The Court stated: "The holding here then must be, and is, that this Court is without power to transfer this case to any other District." (p. 13). And further, "It is, therefore, under the law not [fol. 44] within the power of the Court to transfer the case to either the Houston, Galveston, Victoria or Brownsville Division, but only to the Laredo Division." (p. 14).

Therefore, by initiating prosecution in the Western District the Attorney General has done what is well within his recognized power to do where dual venue exists, and he has exercised a power which this Court did not possess under the law considering the nature of defendant's motion—or at least as this Court so construed its powers.

While leave of Court is required by Rule 48(a) for dismissal of an indictment by the Attorney General or the United States Attorney, we point out that it has been an almost universal practice in this District to grant such leave as a matter of course. Before the advent of the Federal Criminal Rules the Government attorney could dismiss an indictment without leave of Court even being requested. We further point out that under the plain language of Rule 48(a) at the stage of proceedings which this case has reached the defendant has no standing in court to object to the dismissal of the indictment by the Attorney General or the United States Attorney. It is only when trial has begun and jeopardy attached that the defendant can object to the dismissal of the indictment.

[fol. 45] As pointed out above, the indictment in the Western District is identical in every particular with the indictment previously returned in the Southern District except

the language regarding the venue. In order that there may be no delay in the prosecution of this defendant, and in order that the labors of defendant's counsel shall not in any respect have been wasted, the Government hereby undertakes to recommend, if the defendant wishes to join therein, that orders be entered in the Western District in regard to the indictment returned therein in accordance with the opinion of this Court on defendant's motion for a bill of particulars, motion for discovery under Rule 16, and motion for inspection of documents and subpoena under Rule 17(c). The Government further agrees that it will supply the defendant with a bill of particulars with reference to the indictment in the Western District in Cause No. 20825, and will immediately arrange for the inspection of documents under Rule 16 with the defendant. In other words, if the defendant is willing, the case can proceed under the indictment in the Western District in all particulars without any delay. While counsel cannot of course bind the Court in the Western District, we believe that if [fol. 46] agreed orders consonate with this Court's opinion on the above three motions are submitted by counsel for the Government and the defendant, that the Court in the Western District would look with favor upon the entry of such orders. Of course, if the defendant does not desire to have orders entered in accord with the opinion of this Court on the above three motions, then the defendant has the perfect right to raise anew the questions which he has already raised in this proceeding in the Southern District, but in such event any responsibility for delay would be solely that of the defendant.

Further, in order that there may be no delay on the part of Government counsel in familiarizing themselves with facts and law of this case, Mr. James T. Dowd, Assistant United States Attorney in the Southern District who has worked for some months on this case, has been appointed by The Attorney General as a Special Attorney to assist the United States Attorney for the Western District in the prosecution thereof.

In the above undertakings the Government does more than it is obliged to do. In *U. S.* v. *New York Great Atlan-*

tic and Pacific Tea Co., 54 F. Supp. 257 (N.D. Texas 1944) the Court held that the Government had a right to dismiss [fol. 47] the indictment after a bill of particulars had been granted and the case set for trial. The Court stated: "That the defendants have been put to considerable trouble and expense in the employment of counsel, and otherwise looking after their own interests and getting ready for trial, seems to be no reason why the prosecution may not terminate the proceedings in the manner chosen here." 54 F. Supp. 258.

For the above reasons it is respectfully submitted that leave of Court should be granted to dismiss the indictment in this case. We are not aware of any case arising in this District, or indeed in any other District in Texas, where leave of Court to dismiss an indictment has not been granted. In the only two cases we have found in any federal jurisdiction in which leave to dismiss was denied, in *U. S.* v. *Krakowitz*, 52 F. Supp. 774 (Ohio 1943) the Court felt that the Government should not be satisfied with a plea of guilty to one count, but should prosecute *all* counts of an indictment, and in *U. S.* v. *Dot*, 101 F. Supp. 609 (Conn. 1951) the Court felt it improper to condition a complete dismissal as to one defendant on the pleas of guilty of other defendant. Neither decision is applicable to the [fol. 48] instant case on the facts. In neither case was there another indictment for the same offense outstanding against the same defendants.

In *U. S.* v. *Bryson*, 16 FRD 453 (D.C. Cal. 1953) there was another indictment pending, as in the case at bar, and the Court held The Attorney General should exercise his power to prosecute one and dismiss the other, which is the customary procedure. For the Court to refuse such leave to dismiss would indeed be extraordinary, and would compel the Government to prosecute this tax evasion case in a division in which neither the defendant lives nor the Government ever contemplated bringing the action in the first place, and in a division in which the Government has indicated above its doubts as to the wisdom of proceeding further. It is unquestioned that jurisdiction and venue lie properly in the Western District of Texas, wherein The Attorney General has initiated prosecution in Criminal No. 20825. Wherefore, leave is respectfully requested to

dismiss the pending action, Criminal No. 6011 in the Southern District of Texas.

Respectfully submitted, (S.) Malcolm R. Wilkey, [fol. 49] United States Attorney for the Southern District of Texas, James T. Dowd, Assistant United States Attorney for the Southern District of Texas.

In all matters stated above in reference to the prosecution of Criminal No. 20825 in the Western District of Texas, I concur therein with the undertakings of the Government as stated.

(S.) Russell B. Wine, United States Attorney for the Western District of Texas.

IN UNITED STATES DISTRICT COURT, SOUTHERN TEXAS, CORPUS CHRISTI DIVISION

MEMORANDUM OPINION—May 4, 1955

Malcolm R. Wilkey, United States Attorney, Houston, Texas, for plaintiff; Marvin K. Collie, Esperson Building, [fol. 50] Houston 2, Texas, Thomas James, Everett L. Looney, 1020 Brown Building, Austin, Texas, for defendant.

(May 4, 1955)

Defendant is charged in a three count indictment with income tax violations, 26 U.S.C.A. 145(b). Reference is made to a memorandum dated April 27, 1955, by the Honorable T. M. Kennerly and concurred in by the writer.

Counsel for the government has transmitted to the court a motion to dismiss, reading as follows:

> "Pursuant to Rule 48 of the Federal Rules of Criminal Procedure and by leave of Court endorsed hereon the United States Attorney for the Southern District of Texas hereby dismisses the indictment against defendant George B. Parr."

Counsel has likewise transmitted, in a separate document, a "statement of reasons for dismissal," in which it is shown,

among other things, that an identical indictment against Defendant was returned on May 3, 1955, in the Western District of Texas, at San Antonio.

Rule 48 reads in part as follows:

> [fol. 51] "(a) By Attorney for Government. The Attorney General or the United States Attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant."

Shortly before 5:00 P. M., on May 3, 1955, the United States Attorney called the court by long distance from San Antonio and advised that the new indictment had been returned there and that he, the United States Attorney, would move to dismiss the case here. He inquired whether the court would want the matter taken up in open court or otherwise. The court advised him to proceed as is usually done by motion to dismiss and to furnish a copy of such motion to defense counsel. The United States Attorney stated that he did not believe the defendant could be heard on the matter under Rule 48. The court stated that he had not read the rule in some time and suggested to the United States Attorney that he proceed in the usual manner.[1]

Shortly after 6:00 P. M., May 3, 1955, the Honorable Everett L. Looney, one of defendant's counsel, called the [fol. 52] court by long distance from Austin, stating that he desired to have an opportunity to look into the matter and be heard before the motion was acted upon. The Court advised him to address a letter to the court to this effect, with copies to adverse counsel.

Local rule 27 provides that motions in criminal cases shall be filed in the manner and within the time fixed by law and the Federal Rules of Criminal Procedure; and

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[1] The usual procedure is by motion to dismiss which generaly is granted as a matter of course. However, the court does have discretion in the matter as shown by the wording of the rule and reflected by the decisions cited by counsel for the plaintiff.

brought on by the Clerk on the motion calendar and forthwith sent to the judge under local rule 25.

Rule 47, Federal Rules of Criminal Procedure reads as follows:

"RULE 47. Motions

An application to the court for an order shall be by motion. A motion other than one made during a trial on hearing shall be in writing unless the court permits it to be made orally. It shall state the grounds upon which it is made and shall set forth the relief or order sought. It may be supported by affidavit."

[fol. 93] Rule 49 provides that written motions, other than those which are heard exparte, written notices, etc., shall be served upon the adverse parties. Since defendant's counsel have requested an opportunity to be heard upon the motion, plaintiff's counsel will proceed as originally suggested by the court by serving notice upon counsel for the defendant and bringing the motion on regularly under the rules. In view of the fact that the writer will be sitting in Brownsville during the next few weeks, the motion will be submitted to Judge Kennerly at Houston.

The Clerk is directed to file the motion for dismissal,[2] and notify counsel of the filing of this memorandum.

(S.) James V. Allred, Judge.

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF TEXAS, CORPUS CHRISTI DIVISION

ORDER TRANSFERRING CASE FROM THE CORPUS CHRISTI DIVISION, SOUTHERN DISTRICT OF TEXAS, TO THE LAREDO DIVISION, SOUTHERN DISTRICT OF TEXAS, FOR TRIAL—Filed May 16, 1955.

[fol. 548] The Court having heard and duly considered the motion as amended of Defendant George B. Parr under

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[2] The motion for dismissal was not filed with the Clerk probably for the reason that it carried on its face a proposed order to be signed by the court.

Rule 21(a) Federal Rules of Criminal Procedure for transfer of this case from the Corpus Christi Division, Southern District of Texas, to the Laredo Division, Southern District of Texas, for trial, and being of the opinion that the motion should be granted and venue of the case should be changed from the Corpus Christi Division to the Laredo Division, in accordance with a written memorandum dated and filed herein on April 27, 1955:

It is hereby ordered, adjudged and decreed by the Court that the motion is granted and that the above styled cause be and the same is hereby transferred from the Corpus Christi Division of this District to the Laredo Division thereof, and that all further proceedings in the matter, including but not limited to the production of all books, papers, documents and tangible objects relating to said cause and the trial of this case, shall be had in the Laredo Division, Southern District of Texas.

It is further ordered that the Clerk of the Court for the Corpus Christi Division shall transmit to the Clerk of the [fol. 55] Court for the Laredo Division all papers in this proceeding, or duplicates thereof, and any bail taken.

Done at Houston, Texas, this 16 day of May, 1955.

(S.) T. M. Kennerly, United States District Judge.

I concur.

Done at Corpus Christi, Texas, this — day of ——, 1955.

James V. Allred, United States District Judge.

In United States District Court

Defendant's Opposition to Government's Application for Leave to Dismiss the Indictment and His Reply to Government's Statement of Reasons for Dismissal—Filed May 16, 1955.

To Said Court:

The events, all of them, leading to this hearing—for leave to dismiss the indictment—occurred with the same United States Attorney acting under the directions of the same Attorney General in charge of every step of this prosecution.

They had a choice between the Southern District and the Western District.

[fol. 56] They selected the Southern District for the place of prosecution by procuring a return of the indictment on November 15, 1954.

They remained quite pleased with their selection through the time of arraignment and through the motion stage, including the controversial venue question.

Not one time prior to the filing on April 28, 1955 of Judge T. M. Kennerly's April 27, 1955 Memorandum sustaining Defendant's motion to change the venue did they express any thought that a trial in the Southern District would put the Government to an "additional burden."

Five days after the filing of the aforesaid Memorandum the Government learned, the United States Attorney says, that a prosecution in the Southern District would be attended by a necessarily inherent risk which would not obtain in the Western District.

What is that "risk"? What is "the additional burden"?

The indictment is for the identical offense.

The venue allegation in the pending indictment in the Southern District reads:

> ". . . *by preparing and causing to be prepared, at* [fol. 57] *San Diego, Texas*, and by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of Texas, *by depositing and causing to be deposited, at the Corpus Christi Division office*, . . ."

The venue allegation in the indictment returned in the Western District on April 3, 1955, is precisely the same as the venue allegation quoted above except for the omission of the italicized portion thereof.

Does the United States Attorney, as an officer of this Court and as a responsible representative of the Government in this case, in good faith bona fidely represent to this Court that there is any greater burden on him at this time to prove the venue allegations in the Southern District indictment than existed on November 15, 1954 when the indictment was returned at Houston?

Does he represent that there is any risk "necessarily inherent in any prosecution in the Southern District" that did not exist when the indictment was returned?

Candor and forthrightness will compel the United States Attorney to admit that any burden or any risk attendant [fol. 58] upon proof of the venue allegations is no different now than when the indictment was returned.

The United States Attorney will not, as indeed he cannot, say that the sufficient proof on the venue question is unavailable to him.

The foregoing being true, the *Statement of Reasons for Dismissal* is replete with plain unadulterated sophistry unbecoming an officer of this Court.

What the United States Attorney did not frankly say in his *Statement of Reasons for Dismissal* is that he is, and has been since the moment it was pronounced, displeased with the ruling of this Court moving this case from the Corpus Christi Division to the Laredo Division. This Court is not unmindful of the fact that while opposing venue at Laredo the United States Attorney repeatedly in his written arguments categorically stated that the Government did not oppose a change of venue from the Corpus Christi Division to the Houston Division, to the Galveston Division, or to the Victoria Division. He entertained no doubts throughout the time the venue question was being considered by this Court as to the availability of proof to show venue in the Southern District.

We believe the facts compel the conclusion that the in- [fols. 59-75] dictment in the Western District, followed by the motion for leave to dismiss in this district, is but an effort to circumvent the April 27 pronouncement of this Court ordering this case transferred from the Corpus Christi Division to the Laredo Division.

True, the United States Attorney has the right, though the propriety of the assertion of the right under the circumstances may well be questioned, to make the effort. This Court, however, is not compelled to place its judicial stamp of approval on the tactics here attempted by the United States Attorney.

[fol. 76] Conclusion and Prayer

In his *Statement of Reasons for Dismissal* the United States Attorney very generously offers to join defendant's counsel in recommending to the Judge of the Western District "that orders be entered in the Western District in Regard to the indictment returned therein in accordance with the opinion of this Court on defendant's motion for a bill of particulars, the motion for discovery under Rule 16, and motion for inspection of documents and subpoena under Rule 17(c)." He would thereby "save any delay in the prosecution of the defendants" and insure "that the labors of defendant's counsel shall not in any respect have been wasted." Assuming, arguendo, that the Judge of the Austin Division, Western District, should be amenable to this suggestion, the offer falls far short of either assuring that there "be no delay in the prosecution" or in assuring "that the labors of defendant's counsel shall not in any respect have [fol. 77] been wasted."

Should this case be dismissed, the defendant will be put to the necessity of making a thorough canvass of the Austin Division of the Western District of Texas to determine whether he has cause to move for a change of venue from the Austin Division to some other district or division under Rule 21(a). If such cause is found to exist, defendant must obtain the evidence to support such a motion. All this will be expensive and time-consuming and will necessarily result in "delay in the prosecution of this defendant." We have already done this job once. The record before this Court on the venue question, decided April 27, shows the enormity of the task.

We do not say that the United States Attorney is acting beyond his authority in seeking leave to dismiss.

We do not say that the Attorney General was acting beyond his authority in giving the United States Attorney authority to move for this dismissal, conditioned though it was on a prior indictment being returned in the Western District.

What we do say, and with all the emphasis and vigor we can summon, is that this Court is not required to sanction,

[fol. 78] and should not sanction, the effort here made by government counsel to thus set itself up as an appellate tribunal to review and nullify the previous order of this Court. An order granting the leave prayed for will do just that. It will create no more respect for the courts; it may result in less.

It is to be presumed that if this dismissal is denied, the case pending in the Western District under the rule of comity will be stayed upon proper and timely motion. Such a motion will be filed by the defendant.

Wherefore, for the reasons stated, and based upon the argument and authorities here presented, defendant prays that the motion for leave to dismiss the indictment be denied.

Respectfully submitted, (S.) Marvin K. Collie, Esperson Building, Houston, Texas, (S.) Clyde L. Wilson, Esperson Building, Houston, Texas, (S.) [fol. 79] Thomas E. James, Capital National Bank Building, Austin, Texas, (S.) Everett L. Looney, Brown Building, Austin, Texas, Attorneys for Defendant.

CERTIFICATE OF SERVICE (omitted in printing)

[fol. 80] IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, CORPUS CHRISTI DIVISION

(Heard in Houston, Texas)

[Title omitted]

REPORTER'S TRANSCRIPT OF PROCEEDINGS HAD ON GOVERNMENT'S MOTION TO DISMISS INDICTMENT—May 16, 1955

Reporter's Certificate to following transcript omitted in printing.

[fol. 81] APPEARANCES:

Malcolm R. Wilkey, United States Attorney, Southern District of Texas, Houston, Texas; James Dowd, Assistant

United States Attorney, Southern District of Texas, Houston, Texas, For the Government.

Messrs. Looney, Clark & Moorhead; Brown Building, Austin, Texas, By: Everett L. Looney, Esq.; Marvin K. Collie, Esq., Esperson Building, Houston, Texas; Clyde L. Wilson, Jr., Esq., Esperson Building, Houston, Texas, For the Defendants.

[fol. 82] May 16th, 1955—Morning Session

Proceedings

Colloquy Between Court and Counsel

The Court: The case this morning is a Corpus Christi case, the United States of America versus George B. Parr, primarily to hear a motion by the Government to dismiss it.

I suggest, however, that I have been furnished with tentative copies of orders in the matters before, motions that were disposed of heretofore, and don't you think we ought to dispose of those orders first?

What is your pleasure?

Mr. Wilkey: Your Honor, I would suggest, pursuant, I believe, to a conversation that counsel, Mr. Collie, and I had with you last week, that the disposition of the orders should probably await the outcome of the Government's request to dismiss the case. We, of course, are amenable to any situation the Court wishes to take, but in all frankness, we did not come in at this time prepared on that—although we could, of course—we did not come in prepared to discuss the wording of the orders.

The Court: What do you say about it?

[fol. 83] Mr. Looney: Your Honor, I think that by all means the orders of the Court that were directed to be prepared in your April 27th memorandum, filed April 28th, should be entered, if for no other reason, for proper sequence.

The Court: I feel that way about it too. I am wondering if you could briefly run over those? It seems to me that they are just about in accordance with the opinion.

Mr. Looney: I don't have copies of that before me at this time, Your Honor.

Mr. Wilkey: I don't have copies either, Your Honor. Let me confer a moment with Mr. Dowd here.

Your Honor, after conferring with Mr. Dowd, who has studied these orders, we don't have any objection to the drafts of the orders as submitted by counsel for the defense, or their entry at this time.

The Court: I will say this about the order for the production of papers, that as submitted by the defendant they call for proceedings at Laredo, and so on, and I would rather substitute for that the other paragraph of the order for the production of papers, if you have it before you there.

Mr. Wilkey: No, Your Honor, we don't have.

The Court: If not, why, here is a copy. Do you have it [fol. 84] before you?

Mr. Wilkey: No, Your Honor, we don't have.

The Court: I think the clerk will want it back. Do you have a copy, counsel?

Mr. Looney: No, sir, I am sorry. I didn't bring mine, sir.

The Court: Well, I would like to substitute for the third paragraph this language:

"If the parties shall not have, within twenty days, agreed upon the time and place and manner for carrying out this order, then either party may apply to the Court for specific directions. It is believed, however, that the parties will be able to readily agree upon the procedure."

There is a procedure outlined in the one submitted by counsel for Mr. Parr, but I don't think it is very practical, and I think you can agree upon how you will do that, if you will get together on it. And so I am going to substitute what I have just read for the third paragraph, if you want to look at it.

Mr. Wilkey: That wording is satisfactory to the Government, Your Honor. As the Court read it over, I didn't get whether that specified that this would be done at Laredo or not, or did the Court leave it to the parties?

[fol. 85] The Court: The order submitted specified that it should be done at Laredo.

Mr. Wilkey: Yes, the third paragraph does.

The Court: Well, now this—let me see it, Mr. Clerk.

In other words, it may not be convenient, and I do not

think it necessary for the Court to dictate those things. You can probably agree on them.

Mr. Wilkey: By leaving it to the discretion of the parties here as to the time, place and manner of carrying this out, that is fine, Your Honor. It might come about that Laredo will not necessarily be the most convenient spot for either party, and we appreciate that change.

The Court: That is right. I am then signing that order. This is the 16th, is it not?

The Clerk: Yes, sir.

The Court: I am handing this to the clerk, making that substitution. The clerk will take out the old and put in the new one.

The next is the order on Defendant's Motion for Bill of Particulars. I think that is in accordance with the opinion rendered. Have you examined that?

Mr. Dowd: Yes, Your Honor, and I believe that is quite [fol. 86] all right.

The Court: I have signed and passed to the clerk then the order on the Bill of Particulars.

I have also signed and passed to the clerk the order with respect to the subpoena duces tecum.

I have also signed and am passing to the clerk the order transferring the case from the Corpus Christi Division to the Laredo Division.

It seems to me that we are now ready to take up the Government's motion for dismissal of the case. Are you ready to present it?

Mr. Wilkey: Yes, Your Honor.

The Court: Are you ready?

Mr. Looney: Yes, Your Honor.

The Court: You may present the motion for the Government then.

PRESENTATION BY GOVERNMENT

Mr. Wilkey: May it please the Court, the Government has filed in this case a dismissal of the action subject to leave of the Court being granted, as I believe is the procedure under Rule 48-A.

With that dismissal document, the Government has filed the authority conferred on me, by the Attorney General of the United States, to dismiss the indictment in the Southern

District of Texas conditioned upon an indictment of similar import being returned in the Western District. Also at-
[fol. 87] tached to that dismissal was the indictment, or a copy thereof, which was returned in the Western District of Texas on May 3rd.

As this Court is undoubtedly familiar, in income tax fraud evasion cases, the venue frequently lies in more than one district. That is to say, venue always lies in the district in which the collector's office is located. In the case here in the Southern District of Texas, that is at Austin, Texas, and has been for many years, and that is why for many years, here in the Southern District, all income tax fraud cases involving residents of the Southern District have customarily been tried at Austin. I think that one would have to go back many years to find an income tax fraud case tried here in the Southern District.

Venue lies at Austin because that is where the collector's office is located, and because the usual charge in a tax fraud case is that the act to evade the payment of the correct tax was the filing of a fraudulent return at the tax collector's office, and of course that would take place at Austin, Texas, and the indictment returned in the Western District so charges.

Now, in certain cases, acts leading to a tax evasion may
[fol. 88] have also taken place in the district of the taxpayer's residence, as in the case at bar, as alleged in the indictment in the Southern District of Texas.

In either case, however, wherever the Government chooses to bring its suit, it must prove that the acts leading to tax evasion, affirmative acts, took place in the district in which venue is chosen, and it is a comparatively simple matter to prove the filing of a return at the tax collector's office, but sometimes difficulties are encountered in proving other fraudulent affirmative acts in the district of the taxpayer's residence. Therefore, there is always some risk inherent in bringing the suit in the taxpayer's residence, if the residence happens to differ from the place where the return was filed, and it is for that reason that the Attorney General over a period of years has more or less adopted the practice of bringing it in the judicial district in which the collector's office was located.

Now, of course, the proof of the acts establishing venue and jurisdiction are only a part of the considerations that the Attorney General must have before him at the time that he considers whether to send the case to the Western District of Texas, or to send the case to the Southern District [fol. 89] of Texas. That is only one of the many factors which the Attorney General must consider. Having the choice on the facts of the case as to where to prosecute the case, the Attorney General, on the basis of all factors involved, made a choice, on all of the facts involved in August, to send the case to the Southern District for presentation to the grand jury, and after a grand jury investigation, if the facts justified it, for indictment in the Southern District.

Now, since that time several things have occurred which have led the Attorney General to a re-evaluation of his decision of last summer to prosecute the defendant Parr for tax evasion in the Southern District of Texas, and the Attorney General, having the choice under the statute of bringing the suit in Austin, in the Western District, or in the Southern District, as it was brought originally, has brought a new indictment in the Western District, and has instructed me to ask leave of the Court to dismiss the one in the Southern District.

The two indictments are similar in all respects, except the allegations of the acts conferring venue upon the Court, and they differ in the two indictments, but that is the only difference. The other items are the same.

[fol. 90] Now, I should like to point out to the Court, and I think the Attorney General owes a duty to the Court to point out, the reasons why the Attorney General made the decision to ask leave of the Court to dismiss in the Southern District, and among these reasons are these:

First of all, in August of 1954, last summer, when the Attorney General had to decide in which district to send this case for investigation by grand jury and prosecution, the situation in the Western District was that Mr. Charles Herring, United States Attorney there, was anticipated being replaced by an appointee of this administration. It was contemplated that he and the majority of his staff in that district—in fact, it has transpired that all of his staff has left—that the United States Attorney and his

entire staff perhaps would be changed during the time that this case was being investigated by the grand jury and then prosecuted in the courts in the Western District, and so for continuity of prosecution, it was advantageous to send the case to the Southern District, where a new United States Attorney and staff had already been selected.

I point out that this case, as was announced publicly, [fol. 91] was not necessarily ready for indictment at the time that it was submitted to me. It was announced that a grand jury investigation was to be held, and it was held here in Houston, and over forty-one witnesses were called before that grand jury. Now, if that had been done in the Western District of Texas, the people interrogating the witnesses before the grand jury would have accumulated a great knowledge about the intricacies of this case and the personalities involved, which would not have been available to Mr. Russell Wine, the new United States Attorney there and his staff, and the events have justified the Attorney General's consideration of that point because Mr. Wine has come in, and there is not one assistant left, except at El Paso and in the lands division, who was in Mr. Herring's office.

Now, in this case, by the new indictment in the Western District, and the appointment of Mr. James Dowd here as special assistant to the Attorney General to prosecute the case in the Western District, a continuity of prosecutive effort has been attained, which could not have been attained by submitting the case to the Western District in the first place.

So there is one important change that has taken place [fol. 92] since this indictment was first sought last fall, a complete change in the prosecutive staff and set up in the Western District.

A second thing of importance in the Attorney General's consideration has been the change in the case from trial at Corpus Christi to Laredo. When this case was up for consideration, it was considered that the indictment would be brought and the case, the venue would properly lie in Corpus Christi, which happens to be the home division of the defendant. It was never contemplated that the case would be transferred to Laredo, and it being the home dis-

trict or division of the defendant, it was not contemplated, in fact, that the case would be transferred anywhere, because, in all frankness, we thought the defendant would be satisfied to try his case on his own home grounds. In fact, he might be considered to have an advantage there rather than somewhere else. But since that time the defendant has chosen to ask a change of venue to Laredo, which has been granted, and we are not here to re-argue the reasons for that, but we do point out that this introduces a new element into the consideration of the Attorney General as to where this case should be prosecuted, and since up until the time of trial under Rule 48-A the Attorney [fol. 93] General has the power to dismiss, with leave of the Court, and the defendant is not in a position to object under the rules, and under all former practice up to the time these rules were adopted the Attorney General exercised his power to bring another indictment in another district when confronted with another situation that he did not anticipate last August or September.

There is a third thing that affects not only the composition of the jury panel which might be considered, as comparing Laredo and Corpus Christi, Laredo being a much smaller division—75,000 over 320,000 in Corpus Christi—but thirdly there is also the problem of the witnesses in this case. Without revealing in great detail the nature of the Government's case, I point out to the Court that this case in great part will be based on the testimony of witnesses who are residents and long time acquaintances and friends of the very defendant in this case. These witnesses, in most instances, are reluctant, and in some instances are hostile. We feel that the trial of the case in Laredo, close to the defendant's seat of political power and his associations there, would have an adverse effect on eliciting the truth from the witnesses the Government will be forced [fol. 94] to bring in order to establish this case.

In all frankness, in the interest of justice, in the interest of getting the truth from a large number of witnesses who are absolutely essential to the prosecution of the Government's case, we feel that those witnesses will testify more freely, more honestly, more frankly, more to the truth of the matters which should be proved in his case, the

farther removed they are from the American-Mexican border district, in which Laredo is located.

That is a third important reason which changes the appraisal that any prosecuting officer must necessarily make of the choice of venue in a case.

A fourth thing which might be said should have been anticipated, but which was not, has been—I refer to newspaper publicity in regard to this case. It is evident from the attention which the newspapers in Corpus Christi, and in Laredo, and along the American-Mexican border, Brownsville, have given to the case of this particular defendant, that the trial of his case will be attended by an undue amount of publicity.

The jurors would go home every night to hear on the radio the newscast, the local newscast, and read in the [fol. 95] evening papers a description of the evidence they heard in the court that day, interpreted, honestly, but interpreted, by newspaper reporters. That same would be true the next morning at breakfast before they came down to listen to the evidence on the case for that day.

Now, if this case is tried, as I pointed out in our opposition to the change of venue, in Houston, or Galveston, where the newspaper publicity has not been nearly so intense as it has been down at Corpus Christi or Laredo, or Brownsville, then we will have the trial of a case which is another income tax fraud case and not the particular dramatic trial of this particular defendant, which it would be in Laredo or along the border. I do not say there will not be intense publicity in Corpus Christi, Laredo or Brownsville, no matter where this case is tried, but the jurors who are trying the defendant and hearing the evidence of the Government, and of the defendant, will not be reading those newspapers, but they will be reading the newspapers in their own home town, which have not given an extraordinary amount of publicity to this case. Every move in this case has been followed in the Corpus Christi and Laredo papers, while I have noted that in some in- [fol. 96] stances the filing of papers was merely noted in the Houston papers, for example, and in some cases not even mentioned. I think the same—although I have not checked it—I think the same, to a degree, would be true of Austin, or other places in the Western District.

Now, for those four reasons, Your Honor, the change in the prosecutive staff and set up in the Western District, the change of venue to Laredo, affecting the choice, the wide choice, of jurors available, thirdly the influence of the vicinity of the trial on the witnesses which the Government must necessarily call to establish its case, and fourthly the advantage both to the defendant and Government alike of trying this case in an atmosphere of a lawsuit and a trial in a court of justice, rather than a drama in which the jury or jurors find themselves taking a leading role. For these four reasons, the Attorney General believes the trial should be conducted in the Western District.

Now, I have spoken of the reasons animating the Attorney General in bringing the indictment in the Western District, and instructing me to dismiss it in the Southern District. If any of those reasons seem to this Court to [fol. 97] be sound, or that the Attorney General, in all reason, could consider them sound, then I submit under Rule 48-A the Attorney General has the power and the right to dismiss this action and leave of Court should be granted.

I do not think that Rule 48-A, even though it was modified from the previous practice, was intended to vest in the courts the discretion of the chief prosecuting officer of the Government as to where the prosecution should be brought and as to where it was advisable, from the Government's point of view, to bring the prosecution, assuming that the Government has a choice originally. I think, since the Attorney General is charged with bringing these prosecutions, and of making the choice as to where he shall bring them, that that is properly his office, and if he conducts it in a reasonable manner, and has reasons for his action, no court should question them.

That was the view of the Court adopted in the case of the United States versus Bryson, which I have cited to Your Honor in the little memorandum we filed some couple weeks ago. In that case, which is the only case we have been able to find in Federal Jurisprudence subsequent to the rules where an indictment was brought subsequently in a second district and the Attorney General moved to dis- [fol. 98] miss in the original district. In that case the

Court said that that was within the power and responsibility of the Attorney General, and having given the Court what appeared to be a good reason for that, then the Court would grant leave as a matter of course to dismiss the indictment, and we submit that as a proper guide for the action of the Court here.

As the Court has already probably seen by the Advisory Committee notes to Rule 48-A, in U. S. Code Annotated, up until 1948, the adoption of these rules, it was generally held, beginning with the Supreme Court decision in the confiscation cases and later in the Woody case, and other cases, that the prosecuting officer, the United States Attorney, or Attorney General, had unlimited power to dismiss an indictment at any time. That was the rule as the advisory committee note says, and it was an innovation on the practice existing when the rule was written to require leave of the Court to be granted.

Now, we submit that that was not intended to transfer any of the functions of the Attorney General to the Court, but was merely to give the Court control over the entries made in his docket in the disposition of cases, which it has in all other instances, making it consonant with practice [fol. 99] under other rules and other situations both in criminal and civil law, and the decisions subsequent to that, in U. S. versus Bryson, it has been a universal practice of the courts in dismissing the indictment on request and authority of the prosecuting officer, shows this has been the interpretation of the courts.

In all of the federal cases before and after the rules, we have found only two cases in which the Court refused to grant leave to dismiss an indictment. One was before the rule, and the other was after the rule.

In the Krakowitz case, because there was a situation where the Court—where the defendant plead guilty to one count, and the Court did not believe that that was enough, and did not allow the prosecuting officer to dismiss the indictment as to the other counts, because the Court felt that the defendant would get off too lightly, and the prosecuting officer should try the defendant on other counts on which it appeared that he was likewise guilty. Of course in that case it was entirely satisfactory to the defendant.

He raised no objection, and of course in that case there was no other indictment for those other counts. That was before the rule, and that was the Krakowitz case.

[fol. 100] And then in the one case, a Connecticut case, U.S. versus Doe, there a plea of guilty of one defendant was conditioned upon the dismissal of indictments against two other defendants, and the Court felt that this was inequitable and unjust, and that the plea of only one man, one defendant, should not be conditioned on the dismissal of others, and therefore refused to approve this arrangement entered into by the United States Attorney and the defense attorney.

In those two cases, you see, Your Honor, the matter was entirely satisfactory to the defense and to the prosecution, but it did not appeal to the conscience of the Court, in both instances, once before the rule and once after the rule, so the Court in both instances refused to allow the dismissal. In each case, of course, if there had been another indictment pending against the people against whom the dismissal was sought, then the Court would have been satisfied, because the prosecution would have been maintained, and that was the objection of the Court to the dismissal.

There is one other case that we feel is relevant and should be called to the Court's attention, and that shows—and it was a case in 1944, just before the rules, and it is Judge Atwell's decision in the case of the United States versus [fol. 101] Great Atlantic and Pacific Tea Company. In that case the record shows that the defendant not only had no legal right to object to the dismissal, but also that he has no—what might be termed—no equitable right either to dismiss. In that case, the defendant did not object to the dismissal of the indictment, urging that he had been put to great expense, trouble in preparation for trial, and the case had actually been set for trial, and the parties were on the verge of going to trial when the United States Attorney was instructed by the Attorney General to dismiss the indictment.

Judge Atwell considered that matter and said it was within the power of the Attorney General to dismiss the indictment, and he did not see, under any authority, where any trouble, inconvenience, labor or expense the defendants might have been put to in preparing their defense was any

bar to the power of the prosecution in dismissing. That was before the rules, but we think that applies as a good precedent for after the rule as well.

Now, in all these cases then, Your Honor, the dismissal has been allowed where another indictment was pending, and the defendant has been given, or is not given, I mean, by the rule, any power to object.

[fol. 102] To remove any question about the equity of what the Government is doing here, although Judge Atwell said the defendant had no right to raise that objection, we have agreed and stipulated in the memorandum filed, which is signed by the United States Attorney in the Western District as well as myself and Mr. Dowd, we have agreed that in the Western District, if the defendant desires orders consonant with the decree of this Court on the questions of discovery, inspection of documents and bill of particulars, orders entirely identical with these orders here, may be entered in the Western District, if the defendant desires. Now, of course if the defendant does not desire, in the Western District, to have these same orders, he will be free to raise again any motions which he has raised in this Court, or any others that he desires also, but we have agreed with the defendant, or we have stipulated that we are ready to agree and submit such orders for Judge Rice's consideration in the Western District, in order that there will be no delay in the prosecution of this case, and in order that the labors of defendant's counsel will not have been wasted, and in order that the matter may proceed just as if it were in the Southern District of Texas, and that the defendant will not in any way have suffered any injury [fol. 103] or expense from the consideration of these motions here.

We do that also to stress that the motive of the Attorney General in placing this in the Western District is not to evade the effect of the orders here already entered in the Southern District of Texas. Now, on that point I was handed at about twenty minutes of ten a memorandum submitted by the defendant on this matter. I have not read it entirely, but in scanning it I notice that the defendant lays great stress on these two points, first that it is within the power of the Attorney General to do what we have done here, and secondly, and that is what the defense has offered,

that it is an evasion of the Court's order transferring venue. We want to urge in all sincerity that the order transferring venue was one of several factors which the Attorney General considered in re-evaluating the position the prosecution would find itself in in the Southern District and the position the prosecution would find itself in in the Western District.

Those I have outlined, the change in the prosecutive staff there, where for twenty years all income tax cases have been tried; the question of witnesses, the question [fol. 104] of jurors, the question of newspaper publicity.

It has been the desire of the Government, and I think Your Honor has found it reflected in our replies to defendant's motions, to secure a trial in this matter in an area where it can be judged as a judicial proceeding, and where the jurors and persons participating therein will be in a court of law, and not in some headline drama every day, and every night.

We have noted carefully that in Your Honor's opinion on the change of venue, Your Honor has said that he had no power to move this case outside of the Southern District of Texas under the terms of defendant's motion. Your Honor, in another place, further stated that as the Court construed its powers, it had no power to order this case transferred to Houston, Galveston, Victoria or Brownsville in the Southern District of Texas, but only to transfer it to Laredo or to leave it at Corpus Christi. Those were the only two places which the Court considered it had power to place the trial of this case.

Your Honor, the Attorney General has the power to bring an action in the Western District, and the Attorney General has exercised that power. The Attorney General has placed the cause of United States versus Parr in the Western [fol. 105] District. That was a power which the Court did not have on the motion for change of venue, and it was a power which has always been considered to reside in the Attorney General and prosecuting authority.

Therefore, Your Honor, we submit that if the reasons of the Attorney General, any one of them, appears sound, or if they appear to you to be in good faith, and they appeared sound to the Attorney General, then in his discretion, as the chief prosecuting officer of the Government, then

he should be allowed, as has always been the case, to exercise his right to dismiss in the Southern District of Texas and continue the prosecution in the Western District, as was done in the United States versus Bryson.

We feel that for the Court to refuse leave, to refuse to grant this leave to dismiss, would be to impair the Attorney General in the due excercise of his responsibilities, and would put upon the Attorney General a restriction which the Supreme Court did not see advisable to put in Rule 48-A itself when it was adopted in 1948. Therefore, Your Honor, we respectfully move the Court to dismiss the indictment in the Southern District of Texas.

PRESENTATION BY DEFENDANT

Mr. Looney: Your Honor, we would like to supplement [fol. 106] this record with a short piece of oral testimony.

The Court: Call your witness.

Mr. Looney: Thank you. I would like for Mr. Wilkey to come as a witness, and we waive the oath, Your Honor, so far as I am concerned.

Mr. Wilkey: Your Honor, we, of course, are here, Mr. Dowd and I, to answer any questions about this which the Court may direct to us, but as a matter of law, under Rule 48-A, the defendant here has no standing to object to the entry of this dismissal order. Now, that does not mean, and we would not imply, that the Court does not have the right to hear whatever argument counsel may want to offer for the edification of the Court, or, in fact, to hear affirmative testimony to supplement that, if he wishes to bring that out, but we do think that under the rule that it is going a little further than making an argument to the Court in filing briefs for the Court's edification to call the United States Attorney and interrogate him presumably about matters which would be within the confidence of the Department of Justice.

The Court: I repeat, counsel, that the wording of the rule contemplates that there is some—I don't know how much—discretion with the Judge of the Court. In excercising that discretion, I think I ought to have the facts. [fol. 107] If the defendant in the case has any facts he wants to present to me, whether from the District Attorney

or otherwise, in the exercise of that discretion, if I have that discretion, I think I should hear it, and I see no objection to your testifying as a witness.

Mr. Wilkey: Subject to our objection, Your Honor, and any objections which we might want to make to specific questions, I will be glad to take the stand.

The Court: All right.

Mr. Looney: Your Honor, last week, through my associate, Mr. Collie, I made known to Mr. Wilkey, through Mr. Dowd, as I understand it, that we might have a few questions, and also asked them if they would have available today the '49, '50 and '51 income tax returns that were filed by the defendant and I understood from my associate that Mr. Dowd said they would be here.

Mr. Dowd: May it please the Court, Your Honor, photostatic copies are here.

Mr. Looney: That is all right.

Mr. Dowd: And, Your Honor, we agreed to bring the copies in at the defendant's request in lieu of their serving us with a sufficient subpoena, and of course we reserve all [fol. 108] of our objections to what they might want to do with these.

Mr. Looney: If you will just hand them to the witness, I don't particularly care to even look at them, Your Honor. I think there is some information on there that is material to this hearing.

The Court: So that we can understand what the objections are, they are the same ones that counsel just related?

Mr. Dowd: Yes, Your Honor.

The Court: All right.

Mr. Wilkey: Mr. Dowd, the second envelope there contains duplicate copies that belong to Internal Revenue. You may want those.

The Court: Of course counsel understands that I am allowing the District Attorney to be questioned, and am ruling on it in principle. You may ask him questions that I do not think are admissible, and in that case I will rule on it. You may proceed if you desire to do so.

Mr. Looney: Your Honor, it has been so long since I have had the privilege of appearing here, I don't know

whether it is the rule for counsel to examine witnesses sitting or standing in your court.

The Court: Sitting.

[fol. 109] Mr. Looney: Thank you, Your Honor.

MALCOLM R. WILKEY, of counsel for the Government, being called as a witness in behalf of the defendant, the swearing of whom was waived, testified as follows:

Direct examination.

By Mr. Looney:

Q. You are Mr. Malcolm Wilkey?

A. Yes, sir.

Q. United States Attorney for the Southern District of Texas?

A. Yes, sir, that is correct.

Q. And have been since when?

A. March 17th, 1954.

Q. March 17th, 1954, and Mr. Dowd is your assistant?

A. That is right.

Q. And has been for what length of time?

A. For about—he has been my assistant since March 17th, 1954. He was appointed an assistant some time prior to that. I think he has been there about two years.

Q. Now, Mr. Wilkey, at my request you hold, do you not, certified photostatic copies of the income tax returns of George B. Parr as they appear on file with the first collector, first the collector of the First District, for the years 1949, 1950 and 1951?

A. I do not think these photostats are certified, but they [fol. 110] are photostats of the returns which I am informed by the Internal Revenue are on file in the Internal Revenue office.

Q. All right, that suffices for my purpose. We are both willing to stipulate here before the Court that they are true copies of the returns on file?

A. To the best of my knowledge, that is correct. That is what I asked for, and that is what I have been furnished.

Q. I will ask you first about the 1949 return. Is it a fact that that return shows it to have been prepared by a Mr. Benson?

A. Yes, W. M. Benson.

Q. Is it likewise shown to have been deposited in the Corpus Christi office of the collector for filing at Austin?

A. That is correct. It is stamped "Received, March 15th, 1950."

Q. Is it a fact further that the evidence available to you is that it was prepared and caused to be prepared by the taxpayer, the defendant, in the Southern District of Texas?

A. Yes, the evidence available to us indicates that.

Q. All right. Now, without going into—if it is agreeable with the Court, without going into detail as to the 1950 and [fol. 111] '51 returns, if the same questions should be asked you as I have just asked you with respect to the 1949 returns, would your answers be the same?

A. That is correct. The return shows to have been prepared by W. M. Benson in each case, and to have been deposited either on March 15th or 17th in the Corpus Christi sub-office.

Q. And the other answer that you gave with respect to the 1949 return, with respect to it having been prepared and caused to be prepared by the defendant in the Corpus Christi Divisions of the Southern District of Texas, that testimony is likewise available to you?

A. That is correct.

Q. Now, Mr. Wilkey, then any risk that you might encounter in trying this case on the first indictment, to-wit, the one returned by the grand jury in the Southern District in November, 1954, that same risk obtained at that time as obtains at the present time?

A. That is true, but as I stated to the Court a few moments ago, and as I stated in the memorandum filed some two weeks ago, the question of proving venue in the district of taxpayer's residence is only one of the many factors which the Attorney General must consider at the time he [fol. 112] places the case in the hands of a United States Attorney for trial. Presumably in this case that was one of the factors considered, and it is a factor which gives difficulty sometimes in the proof of the Government's case, and it is a factor which, if other things are equal, apparently has for the last twenty years caused the Attorney General to file all of his tax cases in Austin.

Q. Begging your pardon, Mr. Wilkey, but would you be good enough just to give a direct answer to my questions,

and then let your assistant develop any explanation you have on cross? I think it would expedite the matter.

What I am getting at is the question which I think could be answered "yes" or "no." You have no greater risk? There is no greater risk in so far as the venue allegations are concerned at this time than there was at the time the matter was presented to the grand jury last August and the indictment returned, and at all times subsequent to that, up until April 28th? That's true, isn't it?

A. It is true that there is no greater risk in regard to venue proof now than there was then, nor did I indicate in my statement to the Court and in my memorandum that there had been any change at all in this venue risk. I [fol. 113] merely pointed out that this was a risk inherent in the Government's case, and which normally, here in Texas for the past twenty years, has caused the Attorney General to present the cases in the Austin District, but in this case, for reasons involving other factors, and I discussed at least four of those other factors, the Attorney General decided last August to present it here in Houston for trial in the Corpus Christi Division. I at no time in my statement, written or oral, intimated to the Court that there had been any change in the venue proposition. I merely called attention to the fact that this was a risk inherent in the Government's case which the Attorney General normally tried to avoid.

Q. Begging your pardon again, please, Mr. Wilkey, we will expedite matters if you will be kind enough to respond and give an answer without an argument.

A. Mr. Looney, I certainly don't intend to argue with you. It has always been my understanding and position that a witness should first answer a question directly, and then if he has any explanation to make, then he makes his explanation. That is what I tried to do.

Q. All right. Then we will go to the next point. As to [fol. 114] the proof of venue, the Government's responsibility to prove venue wherever the cause might be tried, there is no fact now known to you which was not known to you previous to the returning of the indictment in the Southern District, which would place any additional burden on the Government to prove its venue allegations? Isn't that true?

A. Yes, in all frankness, there is, and I do not wish to go into the strength or weakness of the Government's case, Your Honor, with opposing counsel here, but the very fact that the case in the Southern District has now been transferred to Laredo and the fact that testimony will have to be elicited from witnesses who are either reluctant or hostile makes—throws a little different light on the Government's proof of venue, as it does on the Government's proof of other aspects of the case. I point out to you in that regard that Mr. Benson here, who was in the employ of Mr. Parr and signed the tax returns, was an employe of Mr. Parr, and he has lived down in that area. Not going further into the case, but the change in the location affects the proof as to venue as it does the other facts of the Government's case.

Q. Now, Mr. Wilkey, begging your pardon again, once again, please, sir, you have available to you the same evi-
[fol. 115] dence to show venue at this time as you had prior to the bringing of the indictment in the first instance in the Southern District, that is true, isn't it?

A. Theoretically, yes.

Q. Now, no theory to it, isn't it actually true?

A. As far as the basic facts are, we believe them to the same; as far as the practical problem of proof in a lawsuit, the scene has been altered, the situation has been altered considerably by the shifting of the case from Corpus Christi to Laredo.

Q. That once again—your last statement indicates your displeasure of the moving of the case from Corpus Christi to Laredo, your displeasure as to that only, isn't that true?

A. I think it has been very clear from several documents we have filed that we would have preferred the case to remain in Corpus Christi, and it is certainly clear from the action of the Attorney General and myself that the Attorney General prefers that the case go to Austin, and believes, in the exercise of his office as the chief prosecutor, it ought to be prosecuted there in Austin.

Q. All right. Now, you do not say, do you, Mr. Wilkey, that there is any less proof or less witnesses available to you to show venue in the Southern District of Texas at
[fol. 116] this time than there was prior to the time and at the time the grand jury in Houston returned the bill of indictment against this defendant in the Southern District?

A. I do not say that the basic facts have changed. I do say that the practical problem of the Government prosecutor in making proof has been altered, and I further point out that I did not list a change in our venue situation as having occurred. I merely listed it as an inherent difficulty in the Government's case in prosecuting anybody in the Southern District of Texas who files his return at Austin. It is not our contention that the facts have changed. Our contention is that the changes occurred in the prosecutive staff, in the panel of jurors before which we will be expected to try the case, probably in the attitude of some witnesses and the effect of newspaper publicity, which may have an adverse effect on the defendant as well as the prosecution.

Q. Now, Mr. Wilkey, you have mentioned that newspaper publicity. Isn't it a fact, and don't you know it to be a fact, that the only publicity attendant upon this case was obtained by the newspaper men from either the court files or from someone on your staff, and not one single statement has appeared in the paper with respect to this case from [fol. 117] the defendant, emanating from the defendant or his counsel. Isn't that a fact?

A. I have in no way intimated that this newspaper publicity was derived from improper sources, or was something in itself that was improper. I merely mentioned it as an existing fact, and that, I think, is influential on the consideration of what kind of a trial the Government and the defendant will get at the various places. I think it has some bearing on the Attorney General's decision to place the action in Austin.

Q. You have not yet answered my question, Mr. Wilkey, if I understand you. What my question to you, stated in another way, was, you have not seen a line of newspaper publicity with regard to this transaction, either at the time it was being investigated by the grand jury or subsequent thereto, that emanated either from the defendant or defendant's counsel, have you?

A. No, I have not, nor have I from the prosecution counsel. It has all been derived from the mere filing of papers in the court records, and the actions taken by counsel in open court, and therefore the same could be expected on the trial of the case. Neither defendant counsel nor the prosecution counsel would need to make any statements to at-

[fol. 118] tract the attention of the newspapers to this case. It would simply be the inescapable result of the case taking place in Laredo or Corpus Christi, or Brownsville, or anywhere along the border there. I have not in any way intimated that you or other counsel, or ourselves, were responsible for the publicity. It is just a fact.

Q. Now, you don't intend by that statement to infer that there has been any character of publicity whatsoever in any paper in Laredo adverse to the Government's position in this case, do you?

A. I am not talking about——

Q. Now, please, just answer that question, and then give your explanation if you will.

A. All right. I don't know that there has been any publicity adverse to the Government's case anywhere. I do know that there has been publicity, and I do know where it has been intensified, and it is on the basis of the perfectly legitimate interest that the publicity has arisen in those ways, and it is that fact, not that it is favorable or unfavorable to the Government or the defendant, that I brought before the Court for its consideration.

Q. Now, isn't it a fact, and don't you know it to be a fact, Mr. Wilkey, that there has been less publicity about this [fol. 119] case in the papers circulated at Laredo, with the exception of the small circulation of the Corpus Christi Times that is going down there, and the Liberto publication which I mentioned in some previous briefs in pleading before the Court, that there has been less of it in Laredo than any place within your knowledge, any of the places now under discussion?

A. By places under discussion, you mean what?

Q. I am speaking of Austin and Laredo.

A. No, to me all of the information in the papers I have seen, there has been more in Corpus Christi, Laredo and Brownsville than anywhere else, and I think it perfectly logical that that be true, because the defendant lives in about the center of a triangle around which those three cities are located, and on the basis of the papers I have seen, there has been more publicity in those three spots than here in Houston or anywhere else.

Q. More publicity in those three spots than Austin or Houston or anywhere else? That is your statement?

A. Yes.

Q. Have you ever seen any of the issues of the Austin papers that came out since this investigation first started with the Houston grand jury?

[fol. 120] A. I think I have. I certainly do not read the Austin papers intensively, but I have seen them.

Q. All right.

A. And I assume that if there has been any publicity adverse to your client in the Western District, you can bring that to the attention of the Court over there.

Q. Yes, sir, and we are going to get around to that. Now, Mr. Wilkey, who initiated this motion, this sequence of events, which led up to your motion for leave to dismiss this indictment?

Mr. Dowd: Excuse me, Your Honor. I think that we may have a valid objection here. If I understand Mr. Looney's question that by who initiated, is he trying to eventually come around to what types of discussions took place between this office and the Attorney General's office in Washington, or whether the dismissal actually started, or to use your word, was initiated here or in Washington, why, I believe that is a confidential matter Your Honor.

The Court: Read the question, Mr. Court Reporter, please.

The Official Reporter (Reading): "Now, Mr. Wilkey, who initiated this motion, this sequence of events, which led up to your motion for leave to dismiss this indictment?"

[fol. 121] The Court: It strikes me that that objection ought to be sustained. What do you say about it?

Mr. Looney: Your Honor, in his argument, which was not testimony, counsel stated to the Court, if I understood him, or placed the responsibility for this motion for leave to dismiss on the Attorney General as a point of origin of the sequence of events that led up to it. I think it would show or shed light on this matter whether they became alarmed at Washington or whether it was merely the result of the alarm or dissatisfaction of the United States Attorney, and he merely secured permission to take steps such as he took on his own initiative.

The Court: The objection is sustained.

By Mr. Looney:

Q. Now, Mr. Wilkey, it is a fact, is it not, that the Attorney General of the United States, as you say in your reasons for dismissal, has designated Mr. Dowd as a special assistant to the Attorney General for the purpose of prosecuting this case in the Western District of Texas, in the event such a prosecution is had in that district?

A. That is correct.

Q. Now, that could have—that same procedure could have been followed by the Attorney General prior to the [fol. 122] submission of this case to the grand jury in the Southern District, could it not?

A. It would have been very unusual to have initiated a prosecution in the Western District and designated a man then an assistant in the Southern District to prosecute the case, when the man in the Southern District had no knowledge of it any more than anybody in the Western District. It is simply because Mr. Dowd has devoted a large part of his labors since last August in the presentation and preparation of this case to the grand jury and other things that the Government does not desire to waste his time and effort already spent, and thus insures the continuity of the case. For him to start off originally in the Western District would have indeed been an anomaly, and the United States Attorney there might very well have protested.

Q. Now, Mr. Wilkey, this anomaly that you speak of, isn't it a fact that, or do you know it to be a fact, or is your acquaintance with the procedure that ordinarily obtains in an income tax fraud case, if you have any information or opinion, don't you know it to be a fact that in those character of cases, in cases involving the Sherman Anti-Trust Act and the Clayton Act, that the usual procedure is for the Attorney [fol. 123] General to designate somebody especially to come down into the district and have charge of the prosecution, rather that it being an unusual procedure?

A. My knowledge of what has been done in the Austin District in the past few years is that that office over there has handled its own income tax prosecutions. I do know that at the present time the Department of Justice has sent a lawyer down from the tax division to work with Mr. Rus-

sell Wine, the United States Attorney, in the presentation of cases coming to the Austin term this next June, but that is because Mr. Wine and his staff have not had any previous experience in the trial of tax cases, and I may be wrong—I am not fully informed,—I understand that that is a rather unusual situation, derived from the change, the complete change, of the entire staff there in the Western District.

Q. Mr. Wilkey, please, in the interest of time, confine your answers to my questions. Now, do you know who is the acting head of the Criminal Fraud Section of Anti-Trust Department of the Attorney General's office at this time?

A. Of the Anti-Trust?

Q. No, of the Tax Fraud Division.

A. I think in the set up, that is Mr. Mitchell.

[fol. 124] Q. John Mitchell?

A. I believe so.

Q. Don't you know it to be a fact that when Mr. Herring was United States Attorney of the Western District in Austin, Mr. John Mitchell, not on just one occasion, but on several occasions at the request of the Attorney General to investigate and prosecute cases in that division?

A. That may well have been true on some instances. I am not acquainted with that.

Q. All right.

A. From reading the papers, I would judge that in most cases Mr. Herring and his staff prosecuted their own cases there.

Q. Did you ever know Mr. Holmes Baldridge?

A. No, I am not acquainted with him.

Q. For your information for a number of years he was an assistant attorney general in Washington in the Anti-Trust Division. Do you know whether or not he has on more than one occasion been in the Western District in connection with prosecutions of the Sherman Act and the Clayton Anti-Trust Act?

A. I do not know, but I would not be surprised because the Anti-Trust set up in the Department of Justice is entirely different from the tax or other set up. No United [fol. 125] States Attorney prosecutes anti-trust violations. They are all prosecuted by the Anti-Trust Division of the

Department of Justice, which has some two hundred and forty-some-odd lawyers in that department. Our office here, we refer all anti-trust matters to that department.

Q. Let's confine it to the question, Mr. Wilkey. Let's get back to my question, Mr. Wilkey, which is a question I have been trying to get an answer to for some time. The Attorney General could have as easily, last year, before the Parr case was laid before a grand jury in the Southern District of Texas, could have easily designated Mr. Dowd or anyone he might have wished as a special assistant to the Attorney General for the Parr case in the Western District, he could have as easily done it then as he did it the other day?

A. He could have done it then——

Q. All right.

A. —but the reason—I understand the reason he did it the other day was because Mr. Dowd has spent months and months and months in the preparation of the case——

The Court: I think that is perfectly plain to us, that if it goes to the other district Mr. Dowd ought to go with it.

[fol. 126] Mr. Looney: Yes, that is my point. I don't think I have any further questions of this witness.

The Court: Have you any questions?

Mr. Dowd: No, sir, I don't believe so.

The Court: Stand aside. Are there any other witnesses?

Mr. Looney: No, sir, no other questions. I have some matters, Your Honor, that I would like, if it is necessary to do so, to ask the Court, as to this hearing to take judicial notice of the proceedings that we had on the motion for change of venue, and the filed documents in that matter, including those filed by the defendant and by the Government, and that memorandum filed by this Court dated April 27th and filed April 28th, the memorandum of this Court, and the Court orders. I don't think that request is necessary, but I do ask the Court to take judicial notice of those.

The Court: Is there any objection to that?

Mr. Wilkey: No objection, Your Honor.

The Court: It will be so regarded then.

Mr. Looney: With Your Honor's permission I would like to present some argument now.

The Court: All right, suppose we take a recess of about [fol. 127] ten minutes, and then we will hear your argument.

Mr. Looney: Very well, sir.

(Ten minute recess.)

CONTINUATION OF PRESENTATION BY THE DEFENDANT

The Court: You may present your argument for the defendant.

Mr. Looney: Your Honor, the events, all of them, leading up to this hearing occurred with the same United States Attorney——

The Court: Counsel, would you mind coming up to the clerk's desk? I can hear you better.

Mr. Looney: I will be glad to, Your Honor.

All of the events, Your Honor, occurred with the same United States Attorney, acting under direction of the same Attorney General, in charge of the prosecution of this case. They had a choice between the Southern District and the Western District, as he says. I said they had a choice. They selected the Southern District for the place of prosecution for reasons, I am sure, sufficient unto themselves. They remained, in so far as any writing, or word, quite pleased with their selection down to and including the motion stage in this case, in this district, including the motion on the controversial venue question. Not one time, if Your [fol. 128] Honor please, and I have reviewed the papers that they have filed in connection with the venue question again since this came up, and not one time in there did the United States Attorney indicate any troubles if this Court would send the case to Victoria, Galveston or Houston. His only objection was to Laredo. Five days after——

The Court: It seems to me there was some suggestion that it might well be sent outside of the district.

Mr. Looney: That is correct, Your Honor. Suggestions even to that extent, and with no fear of any additional risk, or no fear of any additional burden being cast on him in proving the venue allegations, but five days after the Court's April 27th memorandum, filed on April 28th, the United States Attorney appeared in San Antonio and secured an indictment at the hands of a grand jury impaneled there

for the Western District, and immediately filed his motion for leave to dismiss this indictment.

Now, in the few questions that I have asked counsel, and I think it is demonstrated, Your Honor, that his only fear of the venue in this case is prompted by his fear, real or fancied, of the place, Laredo. He said he has the same proof available to him, the same risk was inherent in the matter [fol. 129] back before the indictment was returned in the Southern District, so actually it boils itself down, Your Honor, to the fact that the United States Attorney just doesn't like to have the case at Laredo.

The two indictments are identical, as he says, with the exception of the venue allegation, and in the venue allegation the San Antonio indictment merely drops out those venue allegations in the indictment which fixed venue in Corpus Christi, or in the Southern District.

I would ask, and have asked, does he represent that there is any risk necessarily inherent in any prosecution in the Southern District, and that was his language in his reasons for dismissal, that did not exist when the indictment was returned in the Southern District, and he said so. Furthermore, I asked if there was any burden, any additional burdens, that had arisen since bringing the indictment in the Southern District of Texas as to venue that did not exist prior to the time the indictment was returned in the Southern District, and he said no. He does work himself back around to the notion though that he doesn't like Laredo. There is something about Laredo that just doesn't suit him.

So he can't say that since this case was filed there has [fol. 130] arisen a doubt as to the venue being in Corpus Christi. He doesn't say that. He is not afraid the venue is not properly in the Southern District. He doesn't say that now, and I emphasize that for the moment because when we get to the Bryson cases—not case but cases. I believe I can point out to the Court where that is of importance in considering this.

As I said a moment ago, in every paper that he filed in connection with our motion for change of venue, opposing it, not only did he not say that there is some risk and burdens about the Southern District that the Government ought not to have to go to in the way of venue, but he categorically

in each instrument he filed said, "We will be glad to have it moved to Houston, and Houston is in the Southern District; we will be glad to have it moved to Galveston, and Galveston is in the Southern District; we will be glad to have it moved to Victoria, and Victoria is in the Southern District, and we would be even glad to have it moved outside of the district."

So actually, Your Honor, I can't help but believe that these so-called reasons are pure unadulterated sophistry. [fol. 131] He won't tell Your Honor that had Your Honor overruled the defendant's motion for change of venue that he would have never the less have moved to dismiss this indictment. He hasn't told you that; he wouldn't tell you that. If he should, Your Honor, and he hasn't and he won't, he would be putting himself in the ridiculous position of saying in this Court that we have taken up the time of Your Honor, and, of much less importance, of course, the time of counsel for the defendant, to consider the proof and to consider the law on the venue question, notwithstanding which Your Honor, even if you had overruled the motion to transfer venue, we would have come in Court and dismissed the case, or attempted to dismiss the case. He hasn't told you that, and he won't tell you that.

Now, Your Honor, up until 1946 when the Federal Rules of Criminal Procedure were adopted, the Attorney General of the United States, or the United States Attorney, acting under the Attorney General's direction, had the absolute unequivocal right to come in and just file a dismissal. It is true that in some instances rather than just file a dismissal, they would ask the Court to sanction it, as was the case, the thing that happened in the Krakowitz case which we shall come to, and the thing that happened in the Great Atlantic [fol. 132] and Pacific Tea case, Judge Atwell's case, which we will discuss later. To try to lend a little bit more to, to try to lend some judicial sanction to their act, they at times came in and asked the Court's sanction, and that has been discussed in the oral reviews and various proceedings with respect to the various amendments to these rules to do that, but there was a great deal of dissatisfaction that arose in a great many districts, Your Honor, on the part of the United States Judges, and it even reached the Supreme Court of the United States, about that rule which permitted a United

States Attorney to just come in and ipsi dixit dismiss a case.

Now, the Honorable Leon Yankwich, before whom I have had the pleasure to submit some matters in California, a very able judge, a very able writer, he delivered an address, Your Honor, at the Judicial Conference of the 9th Circuit in San Francisco July 4th, 1941, on this subject matter, when the judges were advocating, and lawyers were advocating, the law teachers were advocating a change in the rules so as not to give the United States District Attorney unbridled discretion in a matter like that, and that paper he presented to that conference is reported in 1 Federal Rules [fol. 133] Decisions, Page 746, and he was advocating the adoption of the rules vesting in the Court control over discontinuances and dismissals, by the rule setting up the procedure. It was five years before it was adopted, when he said these words, and I am quoting from what he said: "If at all, there is any greater need for discretion in that field and elsewhere. For the quality of criminal justice depends, to a great extent upon the Judge. Ultimately both the prosecutor and the attorney for the defendants are partisans. In the old phrase, it is the function of the Judge 'to hold the balance nice, clear and true,' between the Government and the defendant. He is the guardian of the constitutional rights of the accused. He is the representative of society to see that justice through law is achieved. I believe," said Judge Yankwich, "that the achievement of this goal will be made easier by clothing the District Judge with full discretionary power in the matter of dismissals or discontinuances in criminal cases."

And earlier in the same address, when Judge Yankwich used the term, "discretionary," he pointed to what he meant by "discretionary," by taking the definition from Bouvere's law dictionary, and he said in his argument, "and by that a discretion means a decision of what is just and [fol. 134] proper in the circumstances."

Mr. Justice Frankfurter has said that in the administration of the criminal law reliance must be had, and I quote his words, "on the learning, good sense, fairness and courage of the Federal Trial Judges."

Defendant is, of course, aware of the fact that there is no legal inhibition against a man being indicted for the same offense in two courts of coordinate jurisdiction. However,

in upholding such double indictments, the Courts have been careful to note that the practice is not favored and should not be employed unless there is some good reason for doing so. Thus in the case of United States versus Haupt, 152 Federal 2nd, 771, the Court said, and this is by the Court of Appeals for the District of Columbia, a decision handed down in 1945: "Our conclusion is that the grand jury may return several indictments against the accused grounded on the same criminal act. The pendency of an indictment against the accused, where defendant has not been placed in jeopardy upon it, does not prevent a later valid indictment against him. Generally speaking, the pendency of a previous indictment is not ground for quashing a second [fol. 135] indictment, although it is discretionary with the Court to require the Government to elect upon which indictment it will proceed. A few of the cases bearing on the subject are collected in the margin."

Here is what the Court said then:

"The practice is not commended in the ordinary case."

Again, in United States versus Jones, 7 Alaska 378, a Federal case decided in 1926, it is said:

"While the practice of initiating a criminal action in one Court having jurisdiction and dismissing it and thereafter bringing the action in another Court of concurrent jurisdiction for the same crime is strongly to be condemned, yet there may be cases where the lack of evidence or defect in the complaint would influence the prosecution to dismiss."

Now, the reasons for his motion for dismissal contained only one stated reason. He said there were other factors, but he only stated one of the four in his argument, and I want to digress for a moment from my prepared matter to take up that matter of the reasons that had been suggested in his written reasons.

He says Charles F. Herring was anticipated being replaced, and his entire staff was replaced. Not that it makes any difference, if Your Honor please, but he is in error there, because there is one of the assistants—not at El [fol. 136] Paso, but at San Antonio—serving under Mr.

Wine, the new District Attorney, that was serving under Mr. Herring. That, Your Honor is an afterthought on their part as a reason.

Victoria was all right, Houston was all right, Galveston was all right, a completely new district was all right, until Your Honor entered his memorandum.

Mr. Dowd, or some other person, the District Attorney designate, the United States Attorney at San Antonio is Mr. Russell Wine, and he was the United States Attorney designate for a number of months before Mr. Herring resigned, before Mr. Wine replaced Mr. Herring. Everybody in the Western District knew it. I don't know whether the information creeped over here in the Southern District or not, but everybody knew he was the District Attorney designate way before the matter was ever submitted to the Houston grand jury here in the Southern District. He could have been deputized. He could have been specially deputized. There is no valid reason, there is no reason, if Your Honor please, that, in my motion, that is valid for this unprecedented procedure.

He said this, Your Honor, and this to me—he says that [fol. 137] the ruling of this Court, referring to the April 27th ruling, established a set of circumstances which was never in contemplation of the Government counsel at the time the original prosecution was brought in the Southern District of Texas. That is to say he said it was never in contemplation of Government counsel at the time the matter was submitted to the grand jury in the Southern District that the case, if the indictment was returned and it was placed in Corpus Christi, where it had to go under the indictment as returned, it was never in contemplation, says he, that a motion might be filed to change the venue.

Now, Your Honor, I have only this to say about that argument. I don't believe that the United States Attorney, or the Attorney General either, is charged with any less knowledge of the law than an ordinary citizen.

Rule 21-A had been on the books since 1946, when the Federal Rules of Criminal Procedure were adopted. How can he be heard to say that the U. S. Attorney or the At-

torney General, or both of them, that we could not, that it was not in our contemplation, that the case might be transferred from Corpus Christi if grounds were shown for such transfer, to Laredo. I say to Your Honor that he was charged, and properly so, with knowing, when [fol. 138] they brought the indictment and made their election to bring this case in the Southern District that Rule 21-A gave the defendant grounds to move to change the venue, if so great a prejudice existed in that district as the Court might feel that he could not obtain a fair and impartial trial.

It is hard to believe that the Attorney General or the United States Attorney, either or both, would make any claim of that kind to a Court that they could not, or that it was not in their contemplation that that might have happened.

The whole reason for the argument of Mr. Wilkey today is that the Government does not like Laredo for the forum for the trial of this case, but Your Honor, in his April 27th memorandum, said, "Basing my findings, as I must, wholly on the affidavits, I do not think that the evidence shows that the Government either will or might 'be under a severe handicap' in the prosecution of this case as claimed. I find to the contrary."

So this Court has set at rest that figment before he expressed it in this latest document he filed.

We say to you, if Your Honor please, there may be such a case, but we have found no reported federal decision where [fol. 139] the United States Attorney, after the Court in which the first indictment was filed, had changed the venue under the rules, either 21-A or 21-B, that subsequently he came back and asked for and obtained an indictment in another district of concurrent jurisdiction and then come in and move to dismiss the first indictment, as he does here. There is no such case. The effort may have been made, if Your Honor please, under facts and circumstances such as these, but if the effort was made, the decision was not reported so far as we have been able to find.

Now, Your Honor, just let me digress a moment. The Court is familiar with 21-B, where the Court may, if he feels that justice may be done, transfer a case from the

district in which it is pending, or the division in which it is pending, to another division or another district, with concurrent jurisdiction, if he feels that justice will thereby serve.

Let's apply what happened here to the situation there. Supposing this case—that is on motion of the defendant also—supposing this case, that this case had been transferred on a motion under 21-B, rather than 21-A, to the Western District, the Austin Division, on a plea by the defendant that justice would be best served there, and you [fol. 140] transferred it. Under the procedure that they are undertaking, Your Honor, all they would have to do, after you had entered such an order, is to go back and bring another indictment in the Southern District and move to dismiss the first indictment. That is all they would have to do. It is practically playing footsies with the Court there, or attempting to.

Now, we found no federal case on this, Your Honor, but we have found three decisions by the Courts of Last Resort of three states of these United States, with a rule, not verbatim, but practically and substantially just like the rule 21-A under which this venue was transferred to Laredo.

One of those cases is an Alabama case, decided in 1921, entitled Ex Parte Lancaster.

The Court: Is that a state court case?

Mr. Looney: A state court case, the Court of Last Resort in Alabama, where they had practically the identical rule with respect to venue. Here is what they say in that case:

"Neither the constitution nor the statutes of Alabama authorize the state to apply for, or to secure, a change of venue in any criminal case"—just as the rule is here—in the United States Courts, I mean—"Will the courts allow the State to secure a change of venue indirectly when it is [fol. 141] not permitted directly to do so? What cannot be done directly by law, the law does not permit to be done indirectly. No change of venue can be granted by a Court in a criminal case, except on application, petition or motion of the defendant. The defendant must be the moving party for the change of venue—and not the state.

"It is clear that, when the order of removal of the trial of this defendant from Walker to Marion County was

granted, jurisdiction in Walker County for this offense ended, and jurisdiction was given to Marion County Circuit Court. It is clear that the state cannot have the Court grant a change of venue. It is clear that the trial can be removed but once. Now can the state deprive the circuit court of Marion County of this jurisdiction to try this offense, by entering with the consent of the Court, a nolle prosequi in the case, and thereby transfer the trial back to Walker County?"

The Court: Did both countries have jurisdiction?

Mr. Looney: Yes, sir, and in this case, Your Honor, they had granted a nolle prosequi with the consent of the Court in the county to which the case was transferred.

The Court: What was the man charged with?

[fol. 142] Mr. Looney: Murder.

The Court: In which county?

Mr. Looney: In Walker County, is where the offense occurred and where he was first indicted, and it was on a change of venue that it went to Marion County.

The Court: How did they have jurisdiction in Marion County?

Mr. Looney: It was stated in here that the murder, the alleged murder, that both courts had jurisdiction of it. I don't recall the distinct fact, but the court says that either court had jurisdiction of it.

Now, this case even held, Your Honor, that—and I don't think that the courts of the United States would go as far as they did in this case, but in this case they just said you couldn't have another indictment even with the consent of the court, and it was the same rule.

"To give the state this right to have the trial transferred to Walker County would deprive the defendant of his right to be tried in Marion County for this offense. This would allow the state a change of venue, if permitted. This defendant cannot be deprived of this right to be tried [fol. 143] in Marion County by motion of the state for a nolle prosequi to be entered, which is granted by the court. Neither the constitution nor the statutes of Alabama ever contemplated that the defendant should be in that way deprived of his right of trial for the offense charged Marion County. To permit it, the state, with the approval

of the court, by entering a nolle prosequi, could accomplish indirectly what the statute directly forbids: Namely, a change of the trial of the defendant on the offense charged from Marion County to Walker County—or some other county, perhaps.

"The court cannot approve, or encourage, or permit such practice. It will set up no such precedent. It cannot permit a defendant to be liable to be harassed in that way."

Now, the same situation was in Mississippi. The Supreme Court of Mississippi decided this in 1904, and I quote briefly to the Court:

"The trial could not, on the application of the state, have been transferred to any other county because this is not permitted by law, and the method here adopted is simply an attempt to do by indirection what cannot be done directly."

In a Louisiana case, in 1916, State versus Milano. In [fol. 144] that case several persons had been indicted for the same offense, and the trial court had acquitted some of them. Apparently fearful that the Judge would acquit the remainder if given an opportunity, the prosecution secured second indictments against such persons in another court, and dismissed the first indictments. In holding that the dismissals were void, the Court cited the Coleman case, which is the Mississippi case I just referred to, and said:

"The abandonment of the prosecution in a court having jurisdiction and the institution of the prosecution for the same offense in another court of concurrent jurisdiction, under the circumstances and for the apparent purpose for which it was done in this case is not calculated to increase the respect that is due our courts; and we would not be inclined to encourage the practice, even if we had no precedent for our present ruling."

Does the United States Attorney say, and I ask again,—that he would have moved to dismiss this indictment in this district if the case had been—if the motion for change of venue had been overruled?

Now, let's come to the Bryson cases, and briefly discuss those cases that he cites as support for his position here. [fol. 145] He cites the Bryson cases. Your Honor, there are three Bryson cases, and you can't understand one, I

can't understand it, he can't understand the one he cites, unless you read the two that precede it. They were all in California, in the San Francisco Division.

The Court: Federal court?

Mr. Looney: The federal court, yes, sir, and that was in 1953, Your Honor, after Rule 21-A.

The Court: Those are the cases he cites?

Mr. Looney: Yes, sir. Now, I can tell you about those cases. It was one of those false affidavits, Communist affidavits, in connection with labor unions. He was indicted in California, the San Francisco division, Bryson was, and through his counsel he moved to dismiss the indictment there pending because it did not state an action against him in San Francisco. Venue. The court first hearing it—and there were three different judges that ruled on it, three different times—he overruled that motion and said it did state venue properly in San Francisco. Subsequently a corrective indictment was returned, as frequently happens—not frequently, but it happens at times, and they added—the Government became scared, notwithstanding the Court had sustained them—of their venue allegation, and they [fol. 146] added a little venue allegation in the corrective indictment and said this false affidavit was mailed, deposited in the mail at the San Francisco post office for transmittal to Washington.

The defendant came in with that corrective indictment, and says that the statute which he was charged with having violated, that the mailing was not a part of the offense, and moved to dismiss again, and with another judge in that district writing this time, Judge Oliver J. Carter, and this is not all of the opinion, but he says:

"However, since this is a problem of pleading, and since the conclusion reached is not free from question as a matter of pleading without consideration of the problem of proof,' - and this is what the Court said then—"the Court should point out that the problem would not be present if the indictment was returned in the district in which the alleged false affidavit was filed."

The Court suggested there that this problem, which is a serious problem, would not be presented if he were indicted in the District of Columbia, where the alleged false affidavit was filed. That happened. The indictment was returned,

subsequent to this decision, in the District of Columbia, and [fol. 147] the case which counsel cites in his reasons for dismissal, the last case which was decided on November 27th, 1953, the Court, after pointing out that the indictment charging the same offense against the defendant is now pending in the United States District Court for the District of Columbia, speaking through Judge Goodman, said:

"It has become the duty of the Attorney General to determine in which jurisdiction the offense charged 'was most probably committed, and bring the offender to trial there.' He has made such determination by requesting leave of the Court to dismiss the indictments in this district. His decision in that regard appears to be based on good reason,"—because of the doubt as to whether or not venue was out there in California. That is that the offense was most probably, or was probably committed, in the District of Columbia.

Now, counsel in this case doesn't come up and say to Your Honor, "Now, Your Honor, I have grave fears that this offense was not committed in the Southern District. I have just learned it. I have grave fears," and the Court has not in this case expressed any doubt whatever as to venue being brought in the Southern District of Texas, but [fol. 148] in the Bryson case it was before the Court on two different times before this opinion he cites came up, and it is pointed out that there were grave doubts as to whether the Courts in California could try the case, whether the mailing of the alleged perjured statement in connection with Communist activities, whether that be an offense, whether or not it could only occur where it was filed, in Washington, before the NLRB, and at the Court's suggestion it was that the indictment was brought in the District of Columbia, and the District Attorney sought to dismiss the case in California, and that is what the Court said. There was a good reason for the removal of it because of those grave doubts.

Now, Your Honor, then he cites Judge Atwell's opinion in the Great Atlantic and Pacific Tea Company case. That was decided on March 7th, 1944, two years before the new rules of federal procedure. Now, there were two motions before the Court at the time Judge Atwell wrote that opinion.

The Government moved to dismiss without prejudice its indictment, and the defendant had a counter motion to dismiss with prejudice. Both of them were moving to dismiss the indictment, and it is true, as Mr. Wilkey said, the defendant in saying that the Government should not [fol. 149] be permitted to dismiss with prejudice, they cited the fact they had done a lot of work, and so forth and so on, and if they dismissed it without prejudice it would undo all of their work, but what Judge Atwell said in deciding this case was simply this, that under the law as it then existed the District Attorney had the right to dismiss a case if he saw fit to dismiss it by merely filing a dismissal, and unlike the Judge in the Krakowitz case, Judge Atwell did not feel that there was anything that had happened there that would shock his conscience the least bit, or that would entertain any doubts about the procedure that the United States Attorney was following in that case, and he permitted, or granted the motion to dismiss without prejudice to the federal government, and overruled the motion of the defendants to dismiss with prejudice. Now, that is that case, if Your Honor please.

Now, we get down to the Krakowitz case. That was before the new rules too, before 1946, but Judge Krakowitz took this position, and I think, as far as I personally am concerned, I think rightly so. He points out in that decision that the United States Attorney at that time could have just come in and filed a dismissal without asking for the [fol. 150] Court's sanction or approval. He points out in his opinion, and he even has a report of the colloquy between the Court and counsel, in which he specifically invites the Special Assistant Attorney General, "Well, if you want to dismiss the case, just file it. I don't want to lend my sanction to it," and the Special Assistant Attorney General of the United States declined, expressly declined in open court, and said, "No, I don't want to dismiss it, or to exercise that power. I want the Court's sanction of my action in dismissing it," and Judge Krakowitz withheld his sanction and would not sign the order approving the dismissal, and in so doing that withheld his sanction, and wouldn't sign the order, and Judge Underwood said:

"Mr. Wallace, Special Assistant to the Attorney General, has argued to the Court, however, that upon the presenta-

tion of such a motion, the Court is powerless to deny it, no matter what the factual showing may be, and no matter how repugnant the proposed motion may be to the conscience of the Court."

And he said, "I am not going to lend my sanction to it. If you want to dismiss it, you just go and dismiss it. Don't ask me to put my signature on it. Don't ask me to endorse [fol. 151] that." That is the effect of what he did there.

Now, here is a significant thing. That is a very interesting opinion, it was to me, and certainly Judge Krakowitz went into it very carefully,—I mean Judge Underwood went into it very carefully, because in the course of his opinion he cited from an opinion by Chief Justice Taney, while Chief Justice Taney was Attorney General of the United States, way back before the new rules came in, and here is what he quoted Chief Justice Taney as saying:

"For if any doubts rested in the mind of the Court of the fairness and propriety of the measure, they would not suffer the entry to be made."

That is the entry of sanction by the Court.

Now, the Doe case that he cites, and it was, Your Honor, it was truly a John Doe case, old John Doe versus Richard Roe. For some reason Chief Judge Hincks overruled a motion to dismiss on December 3rd, 1951, and then on December 14th he decided he would set out his reasons for his action, and so instead of using the defendant's name, he said he was going to use John Doe, and did.

Now, it was under Rule 48-A, where the United States Attorney had moved the Court for leave of the Court to dismiss, and I have only a few short quotes from it. Here [fol. 152] is one from Judge Hincks:

"The rule contemplates that the Court shall exercise a sound discretion in the premises."

After saying that, he then pointed out that the Assistant Attorney General had by telegram, as in this case—I don't know whether that telegram has been presented or not, but the Assistant Attorney General by telegram sent from Washington at about 8:30 a.m., yes, he attaches it to his motion. May 3rd, 1955, 9:17 a.m., Eastern Standard Time.

"Malcolm R. Wilkey, care of United States Attorney, San Antonio, Texas.

"You are authorized to dismiss indictment pending Southern District of Texas against George B. Parr for violation of Section 145-B Internal Revenue Code of 1939, if and when indictment returned in Western District. H Brian Holland, Assistant Attorney General."

He states no reasons, just as in this case the Assistant Attorney General states no reasons, and here is what Chief Judge Hincks says. He just got through saying it is a matter of sound discretion for the Court, and he continues:

"Surely if the Court had discretion in the premises, it is entitled to the factual information upon which the final [fol. 153] departmental recommendation is based."

I sought to elicit that information, Your Honor, I think properly, and when they didn't want to voluntarily give it, Your Honor sustained their objection to it, or letting me interrogate them about those matters, but if they do not want to tell the Court, I suppose it is proper for the Court to not make them tell the Court.

Then the Chief Judge says, made this positive, unequivocal statement, for whatever it may be worth Your Honor:

"The dismissal can be approved only on a showing that the Government lacks evidence to warrant a prosecution."

That is what Chief Hincks said.

Have they presented any sort of evidence here? Have they made any sort of statement to Your Honor that they lack evidence to warrant a prosecution in the Southern District?

The Court: Who says that?

Mr. Looney: Chief Judge Hincks, in the John Doe case, Your Honor.

The Court: I doubt if that is correct.

Mr. Looney: Sir?

The Court: I doubt whether that is correct.

[fol. 154] Mr. Looney: I would say this, Your Honor, it was correct—in other words, what he said, he was not going to exercise his discretion to a dismissal of the case unless—and he thought the rule was unless they could show there was no evidence sufficient to support a prosecution. It is true the facts were not as the facts are in this case, Your Honor. He was outraged because the Attorney General was trying to dismiss a case that he thought no

indictment should have been brought on. It shocked his conscience. They ought not to be bringing indictments, and then trading off pleas of guilty for non-suits, but it shocked his conscience apparently, reading the opinion, and of course I say, if Your Honor please, that what he was saying here was that in his opinion, in his conscience, that matter, in his sound discretion, that the case ought not to be dismissed unless they could show that there was no—the Government could show that it lacked evidence to warrant a prosecution. That was in that particular case.

Now, here is one other thing, Your Honor. The Advisory Committee that was set up by the Supreme Court to make recommendations for these Federal Rules of Criminal Procedure did not recommend that the Attorney General [fol. 155] be stripped of his unbridled power to dismiss. It did recommend that a provision be put into the rule requiring him to state in writing his reasons therefore, so as to make it a matter of public record, where he could be called to account, I suppose, by any body at any time thereafter. That is what the advisory committee recommended on Rule 48-A. A statement for his reasons for dismissal.

But, Your Honor, the Supreme Court of the United States itself, notwithstanding the fact that the Advisory Committee did not recommend, it disregarded the recommendation of the Advisory Committee and placed the responsibility on the Court to grant or deny leave to the Attorney General when he sought to dismiss a case, and with no language to indicate, Your Honor, that the denial should only be refused in those instances where the Court might think the Government was getting too lenient with some defendants, there is nothing in the whole thing, with all of the reading I have done, in the Advisory Committee reports, the Law Review articles, or any of that, except that a dismissal of an indictment is or should be within the sound discretion of the Judge where the case is pending, and as I have heretofore pointed out what was meant by Judge Yankwich, when he [fol. 156] said that at any rate a decision of what is just and proper in the circumstances.

Now, Your Honor, Mr. Wilkey says—and I address a few remarks only to him because of the fact that he made the statements, and not because I think it is entirely due any

consideration, but he says, "Oh, we are going to generously come up to you, Mr. Defendant, and say to you that if this case in the Southern District of Texas is dismissed, and you go over to San Antonio or Austin, that we will agree that subject to the approval," and assuming they could get Judge Rice's approval to adopt somebody else's order,—I don't know whether they will or not—"We will agree with you, if Judge Rice is sitting in Austin and he is the Judge who regularly sits there, that he may enter the orders Judge Kennerly entered on the bill of particulars, on the subpoena, on the motion to inspect and photograph and copy," but they stop there. They don't say anything about we will agree that he may enter the same order that Judge Kennerly entered on the change of venue." No, "We won't join you in that." Yet they know; yet they know that it could be transferred from San Antonio on a motion of that kind. They say, "We will thereby save you any time, we will save the time of the Court and counsel by doing that."

[fol. 157] Your Honor knows the record made in this case on the venue question that it was the most time-consuming of all, so far as the attorneys are concerned, in getting the evidence for the Court's consideration. Mr. Wilkey blithely says it wouldn't cause any delay in prosecuting Mr. Parr if this case is dismissed and the prosecution goes to the Western District, but how is he, how can he be so all-knowing, if Your Honor please? Why wouldn't the defendant's counsel, in duty bound to the defendant, be obligated to go through the Austin Division and see whether or not, or ascertain whether or not he believes that there is any prejudice there so as to prevent him from getting a fair trial in Austin? I don't say there is, but I don't believe, if Your Honor please, that a case that has been so publicized as this case has been, a case where according to the press the prosecution was ordered—an unprecedented thing—by the Attorney General from Washington. I don't believe that we could discharge the duty that we owe a client in representing him unless we found out what the sentiment is there, and if we found out that it appeared there was prejudice against George Parr in Austin, the seat of the state government, that is where all of these investigations have been going on, that is where the papers are full of it, nearly so much so as

[fol. 158] Corpus Christi, and they have been for several years—if we go down there, and we want to file a motion, we go out and take our time, and get affidavits, and the Government replies and gets affidavits and submits them all, and we all start over again, and Judge Rice, or whoever is sitting in the Austin Division when the matter comes up, all of that is going to take time.

And so I say to you, if Your Honor please, that this generous offer he makes is not something that will appeal very much to the attorneys representing the defendant, and I doubt if it will appeal very much to the Court, unless he goes all the way.

Now, let us sum up this way, and I want to ask the Court's pardon for having trespassed on your time so much.

We do not say that the United States Attorney is acting beyond his authority in seeking leave to dismiss, nor do we say the Attorney General is acting beyond his authority in authorizing the U.S. Attorney to seek leave to dismiss. We could say it, if it was material but maybe it is not, and we ourselves doubt very much the propriety of it under the facts and circumstances in this case, but we do say this, Your Honor, and emphasize it with all of the vigor we can [fol. 159] summons to our command, the intellectual vigor, if any, we have, that this Court is not required to sanction, and should not sanction, the effort here made by counsel for the Government to thus set itself up as an appellate tribunal to review and nullify the previous order of this Court, and that is simply what they are doing.

Such action will create no more respect for a court, for the courts, and as the Alabama Supreme Court said, such action might create less. And the respect for the courts, which is a basis of this country without which it could not go forward, is more important, if Your Honor please, far more important than either the acquittal or the conviction of the defendant who stands at the Bar in this case.

Therefore, we, if Your Honor please, respectfully pray that the Government's motion be denied, and if it is we can apply to the Western District under rules of comity to stay the case over there pending the outcome of this one, and we are confident such motion would be granted if filed.

Thank you very much.

The Court: I think I can dispose of the matter without hearing further from the Government.

[fol. 160] As a retired Judge, I receive my work in this district from my brethren, the other Judges, and I received a request from Judge Alred to hear these four motions that are disposed of by the opinion filed.

In the motion for change of venue, I found an enormous record. I think there were more than one hundred affidavits, and certainly more than a hundred finally, because there were some filed after the record came to me. There were very satisfactory briefs, and there were several hundred—I didn't count them, and there may have been five or six hundred—clippings from two daily papers in Corpus Christi.

All of these I considered as carefully as I knew how to consider them, and I found myself settled on one opinion about whether the case should be tried in the Corpus Christi Division. I am doubtful that any Judge in this district, or any other district, reviewing the record as I did, would have reached any other conclusion, and that is that I reached the conclusion that the case should not be tried in Corpus Christi, and that defendant's motion for change of venue should be granted.

In reaching that conclusion, or rather in examining the [fol. 161] record, I reached this further conclusion, that I gravely doubted whether in the administration of justice generally, the case should be tried in this district at all. I reached that conclusion, not as favoring either the Government or the defendant, but more from the standpoint of a judge who is charged with the administration of justice in the district.

But when I came to examine the law, I found that I was without power to transfer the case outside of the Southern District of Texas. As you all know, we have in the state courts of Texas a practice by which the judge sometimes of his own motion sends a case here, there and elsewhere. There is no such provision in the federal statutes, and I found, as I understand the law, that I had no authority to transfer the case out of the Southern District of Texas. If I had had that authority I would have sent it to Amarillo,

or Sherman, or Texarkana, or some of those places as far removed from the scene of the troubles as I could, or as I could find. I would have done that not, as I say, to favor either the defendant or the Government, because I feel that justice in the case would be best administered by transferring the case to one of those places.

But as stated, I could not do that as I understand the law, [fol. 162] I then discovered that I could not transfer the case to any other division of the district except Laredo. You gentlemen who were in the case will understand or are familiar with the reasons that I gave in the opinion, which is concurred in by Judge Allred, and I think we are correct in that, that is on the law, that it was not legal, not within the power of the Court, to transfer the case to any place except to Laredo, so the case was transferred there.

Now we come to this motion by the Government to dismiss the case because of the fact that a new indictment covering the same matter has been presented in the Western District, and the Austin Division of the Western District, and I am asked by the Government to dismiss this case in this district. Under the rule—what is it, 46?

Mr. Looney: 48-A, Your Honor.

The Court: —48-A, evidently there is some discretion in the Court as to the matter of whether the case should or should not be dismissed.

In twenty-four years on the bench in this district, I do not recall ever having at any time hesitated to dismiss a case when requested by the Government. That was of course under the old law, and under the present rules. If [fol. 163] I have a discretion under the rules now as to whether this case should or should not be dismissed, I must exercise that discretion and allow it to be dismissed, because I do not think that the defendant, either in the hearing this morning or in this enormous record on the question of change of venue, has shown any reasons why the case should not be dismissed.

In doing that I am assuming as you want me to assume, that the Court in Austin has jurisdiction of the case. On that point, of course, I do not decide it does or does not, whether it has jurisdiction or does not have jurisdiction. I am going to dismiss this case as requested by the Government.

I will say I have enjoyed very much listening to you gentlemen, and hope you will be back in the Court again some time.

Mr. Looney: Your Honor, will you please note an exception to the Court's ruling?

The Court: Yes, all right. Will you prepare the usual order?

I think the case is now at Laredo, and this order should be entered, of course, in the Laredo Division. Prepare the order and submit it to counsel for defendant.

Mr. Wilkey: Yes, Your Honor, we will be glad to do that.

[fol. 164] The Court: Is there anything else this morning?

Mr. Wilkey: Not from us, Your Honor.

The Court: Court will recess under the rule.

[fol. 165] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF TEXAS

ORDER OF DISMISSAL—Filed May 20th, 1955

A Motion in the form of a request for leave to file a Nolle Prosequi having been made on behalf of the Government, the Government having also filed therewith a Statement of Reasons for Dismissal and evidence of the authority of the United States Attorney for the Southern District of Texas to move to dismiss the indictment herein, and the Government showing an indictment against the same defendant for the same alleged offenses to have been returned in the Western District of Texas; and the defendant having filed an Opposition to Government's Application for Leave to Dismiss the Indictment; and said Motion having duly come on before me to be heard on the 16th day of May, 1955, after hearing Malcolm R. Wilkey, United States Attorney for the Southern District of Texas, and James T. Dowd, Assistant United States Attorney, for the Motion, and Everett L. Looney, attorney for the defendant, in opposition thereto, upon consideration of the papers filed, the facts adduced at the hearing (including all the papers and documents filed by the parties on the change of venue question, as well as

[fol. 166] this court's Memorandum dated April 27, 1955,

filed April 28, 1955, and the judgment of the court transferring this case from the Corpus Christi Division to the Laredo Division, of which judicial notice is taken), and the arguments of counsel thereon, it is

Ordered and adjudged that the said Motion in the form of a Nolle Prosequi to dismiss the indictment herein be, and the same is hereby granted, and this case is hereby dismissed; to which action the defendant excepts.

It is further ordered that the bond heretofore fixed in this cause is hereby cancelled.

(S.) T. M. Kennerly, United States District Judge.

Done at Houston, Texas, this 19 day of May, 1955.

Approved as to Form: (S.) Malcolm R. Wilkey, United States Attorney. (S.) Everett L. Looney, Attorney for Defendant.

[fol. 167] In United States District Court, Southern District of Texas

Notice of Appeal—Filed May 20, 1955

The name and address of the Appellant is George B. Parr, San Diego, Texas.

The name and address of Appellant's attorney is Everett L. Looney, 1920 Brown Building, Austin 1, Texas.

The offense is "Wilfully and knowingly attempt to evade and defeat income tax due to the United States of America in violation of Section 145 (b) Internal Revenue Code; 26 U. S. C. Section 145(b)."

A concise statement of the judgment or order dated May 19, 1955:

An order granting motion by the Government for leave of the Court to file a dismissal of the indictment against defendant and dismissing the case, terminating the prosecution.

The appellant, George B. Parr, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the above stated judgment.

Dated: May 19, 1955.

George B. Parr, Appellant, Everett L. Looney, 1020 [fols. 168-182] Brown Building, Austin 1, Texas, Attorney for Appellant.

[fol. 183] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 184-244] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

GEORGE B. PARR VS. UNITED STATES OF AMERICA

MOTION TO DISMISS APPEAL—Filed June 16, 1955

Comes now the appellee, United States of America, by Malcolm R. Wilkey, United States Attorney for the Southern District of Texas, and moves to dismiss the appeal hitherto filed by appellant, George B. Parr, for the following reasons:

I. This appeal should be dismissed because the order of dismissal in the form of a nolle prosequi entered in the Southern District of Texas is *not* a "final decision" in a criminal case within the meaning of 28 U.S.C., Sec. 1291.

II. This appeal should be dismissed because to reinstate the prosecution in the Southern District of Texas would be a futile thing; as the Attorney General has the right and duty to elect which of two pending indictments to prosecute, the indictment in the Western District of Texas can be prosecuted to a final decision irrespective of any proceeding pending in the Southern District.

III. This appeal should be dismissed as frivolous because it is obviously without merit and taken for the purpose of delay.

Respectfully submitted, (S.) Malcolm R. Wilkey, United States Attorney, James T. Dowd, Assistant United States Attorney.

CERTIFICATE OF SERVICE (Omitted in printing).

[fol. 245] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

GEORGE B. PARR, Petitioner,

vs.

HONORABLE BEN H. RICE, JR., UNITED STATES DISTRICT JUDGE for the Western District of Texas, Austin Division, et al., Respondents.

MOTION FOR LEAVE TO FILE PETITION FOR WRITS OF MANDAMUS AND PROHIBITION—Filed July 1, 1955

George B. Parr, Appellant in Cause No. 15162 entitled George B. Parr vs. United States of America, pending in this court on appeal from a final decision of the United States District Court for the Southern District of Texas, Laredo Division, moves:

1. For leave to file the petition for a writ of mandamus and for writ of prohibition, hereto annexed; and

[fol. 246] 2. That a rule be entered and issued against the Honorable Ben H. Rice, Jr., United States District Judge for the Western District of Texas, Austin Division, and Malcolm R. Wilkey, Special Assistant Attorney General, James T. Dowd, Special Assistant Attorney General, and

Russell Wine, United States Attorney for the Western District of Texas, Austin Division, to show cause why a writ of mandamus and a writ of prohibition should not issue against them and each of them, in accordance with the prayer of the petition and why George B. Parr should not have such other and further relief therein as may be just.

Dated July 1, 1955.

Marvin K. Collie, Clyde L. Wilson, Jr., Esperson Building, Houston, Texas, Thomas E. James, Capital Natl. Bank Bldg., Austin, Texas, Everett L. Looney, Brown Building, Austin, Texas, Attorneys for the Petitioner.

[fol. 247] PETITION FOR WRITS OF MANDAMUS AND PROHIBITION

To the Honorable, the Chief Judge and the Judges of the Court of Appeals for the Fifth Circuit:

Comes now George B. Parr and by leave of the court first had and obtained, files this his petition for a writ of mandamus and for a writ of prohibition as hereinafter prayed for, against the Honorable Ben H. Rice, Jr., United States District Judge for the Western District of Texas, Austin Division; Malcolm R. Wilkey, Special Assistant Attorney General; James T. Dowd, Special Assistant Attorney General; and Russell Wine, United States Attorney for the Western District of Texas, Austin Division, and respectfully represents:

I

That he is the appellant in a case presently pending in this court on appeal, No. 15162 on the docket of said court.

The appeal so pending is from an order of the United States District Court for the Southern District of Texas, Laredo Division, dismissing a criminal case against him (R. 165).

The appeal is from a "final decision" within the meaning of 28 U.S.C., Section 1291, and this court has jurisdiction.

For authorities to support this latter statement see Point I, Brief of Appellant in George B. Parr vs. United States of America, No. 15162 pending in this court, page 5.

[fol. 248] The writ of mandamus and the writ of prohibition prayed for herein is in aid of and for the purpose of preserving the jurisdiction of this court to review the final decision of the district court, from which this appeal was taken.

In the appeal so pending, Parr is contending that (1) the dismissal was filed during the trial without his consent, contrary to the provisions of Rule 48(a) R.C.P., and (2) the order transferring the case from the Corpus Christi Division to the Laredo Division, Southern District of Texas, pursuant to Rule 21(a) R.C.P. is res judicata of venue and effectively lodged exclusive jurisdiction, of the offense charged by the indictment against him, in the Laredo Division, Southern District of Texas.

For these and other reasons stated in his Brief he urges that the judgment of dismissal filed May 20, 1955, from which the appeal to this court was prosecuted, is an erroneous final decision of the District Court of the United States for the Southern District of Texas, and that this court should reverse said order appealed from and remand the case to the Southern District of Texas, Laredo Division, with instructions that "the prosecution shall continue in" the Southern District, Laredo Division, and not elsewhere, as required by Rule 21 (c) R.C.P.

II

The record references herein will be to the record on file in this court in the case of George B. Parr vs. United States of America, No. 15162 on the docket of this court.

[fol. 249] The indictment in the case from the dismissal of which Parr has appealed in No. 15162, was returned and filed November 15, 1954, charging in three counts that the accused "did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America" for the calendar years 1949, 1950 and 1951, and the case was placed on the Trial Calendar immediately in accordance with Rule 21(a), Local Rules of the United States District Court for the

Southern District of Texas. The case was called for trial December 1, 1954, at which time the accused pled not guilty to the charges.

The court gave the defendant until January 3, 1955, within which to file motions and gave the Government until January 17 within which to reply (R. 13).

In a Memorandum Opinion dated April 27, 1955, filed with the clerk April 28, 1955 (R. 16), T. M. Kennerly, United States District Judge, to whom had been assigned four motions in the case (R. 17) directed that appropriate orders be drawn and presented (R. 35) disposing of defendant's motion for bill of particulars (R. 17), defendant's motion for discovery and inspection (R. 18), defendant's motion for subpoena duces tecum (R. 22) and defendant's motion to change the venue from the Corpus Christi Division to the Laredo Division (R. 25) in accordance with his Memorandum.

May 16, 1955, the court entered the orders directed in its April 27 Memorandum ordering particulars (R. 171), ordering production and inspection under Rule 16 (R. 175) and ordering the case transferred from the Corpus Christi [fol. 250] Division, Southern District of Texas, to the Laredo Division, Southern District of Texas (R. 53). The Government had opposed the motion for change of venue and had offered evidence in the form of affidavits in support of its opposition (R. 26).

Within six days of Judge Kennerly's action in transferring the case to Laredo, on May 4, 1955, the United States Attorney filed a motion for leave to dismiss the indictment (R. 36) accompanied by telegraphic authorization from the Attorney General dated May 3, 1955 (R. 37), a copy of an indictment returned against the accused in the Western District of Texas, Austin Division (R. 37), and his Statement of Reasons for Dismissal (R. 40), aliunde, "on May 3, 1955, an indictment against the defendant George B. Parr was returned by a federal grand jury at San Antonio, Texas, said indictment charging the defendant in three counts with the same identical offense as charged by the indictment in the instant cause." (R. 40).

May 3, 1955, your petitioner, by one of his counsel, requested leave to be heard in opposition to the motion to

dismiss before action was taken (R. 51). Submission of the motion was taken by Judge Kennerly pursuant to the direction of Judge James V. Allred who regularly sits in Corpus Christi Division (R. 53).

Petitioner not only did not consent to the dismissal of the case but filed his written opposition thereto and was heard orally against such dismissal (R. 165).

May 20, 1955, the order of dismissal (R. 165) was entered purportedly under the authority of Rule 48(a) R.C.P.

[fol. 251] The May 3, 1955, indictment against Parr returned by federal grand jury at San Antonio, Texas, charged him in three counts with the same identical offense as charged by the indictment in the case now pending in this court on appeal (R. 40).

On May 31, 1955, the United States District Court for the Western District of Texas, Austin Division, called the case brought against Parr in the Austin Division, being therein numbered Criminal 3866, for arraignment. Petitioner had previously filed a motion to stay the arraignment and all subsequent proceedings based on the pendency of this appeal; and, subject to the court's action thereon, he filed a motion to dismiss based in part on the proceedings had in the case now before this court. The court in the Austin Division was then engaged in a jury trial and could not hear the motion to stay and the motion to dismiss. On the statement of the court that the arraignment would be "without prejudice to any right" of Parr, he was thereupon arraigned and pled not guilty to the indictment and each count thereof.

Subsequently, on June 7, 1955, the United States Court for the Western District of Texas, Austin Division, heard and overruled the motion to stay all subsequent proceedings in cause No. 3866; and thereafter on June 13, 1955, heard and overruled the motion to dismiss the indictment. Both motions were predicated on the fact that the appeal was pending in this court from judgment of the United States District Court for the Southern District of Texas, Laredo Division, and that the Western District of Texas, Austin Division, had no jurisdiction of the defendant to try him under the indictment charging an offense identical with the [fol. 252] offense charged in the Southern District since ex-

clusive jurisdiction and venue of defendant for such offense was in the Southern District, Laredo Division.

And on June 10, 1955, Parr filed his motion under Rule 21(b) R.C.P. to transfer the case pending in the Western District, Austin Division, to the Southern District, Laredo Division; and, on June 21, 1955, amended said motion to request a transfer to the Laredo Division or, alternatively, to the Corpus Christi Division. On June 20, 1955, in aid of the motion to transfer Parr filed a motion for supplemental bill of particulars in preparation of his defense to show that the offense charged in the case pending in the Western District, Austin Division, was likewise cognizable in the Southern District, Corpus Christi Division. The court took submission of the motion for bill of particulars and of the motion to transfer under Rule 21(b) R.C.P. on June 24, 1955, and on June 29, 1955, entered an order, first overruling the motion for bill of particulars and, second, overruling the motion to transfer the case.

Proof of the proceedings in the Southern District of Texas, Corpus Christi Division and the Laredo Division, and of the pendency of this appeal was made to the United States Court for the Western District of Texas, Austin Division, at the hearing on the motion to stay, at the hearing on the motion to dismiss, and at the hearing on the motion to transfer.

On June 29, 1955, immediately after the court overruled the motion to transfer, and on the same day and at the same session, the defendant again advised the judge of that court of the pendency of this appeal and of the fact that the record had been filed therein and of the fact that the United States [fol. 253] Attorney had filed a motion to dismiss the appeal, and of the fact that he had completed his brief for filing and had filed twenty copies in this court on June 28, 1955; a copy of which was thereupon tendered to the court; and again urged the United States Court for the Western District of Texas, Austin Division, to stay the proceedings in that court until after the disposition of the appeal pending before this court. Said motion was overruled and the court set down for trial the case against Parr, Austin Criminal No. 3866, for the 18th day of July, 1955.

Unless prohibited by this court, the United States District

Court for the Western District of Texas, Austin Division, will proceed to try the case against Parr in that court; notwithstanding the pendency of this appeal and notwithstanding his action in so doing will constitute a usurpation of the jurisdiction of this court to hear and decide the issues presented on this appeal in this court in No. 15162 entitled George B. Parr vs. United States of America.

III

This court is authorized to issue its writ of mandamus and its writ of prohibition as prayed for herein in order to protect and preserve its jurisdiction over the person and subject matter of the case herein pending on appeal; and an alternative writ or rule nisi may be issued by a judge of this court, it having jurisdiction. 28 U.S.C., Section 1651.

Wherefore the petitioner Parr, the aid of this Honorable Court respectfully requesting, prays:

1. That a writ of mandamus be issued out of this Honorable Court directing and commanding the Honorable Ben [fol. 254] H. Rice, Jr., United States District Judge for the Western District of Texas, Austin Division, to vacate the order of said court entered on the 29th day of June, 1955, setting down for trial on July 18, 1955, the cause therein entitled United States of America vs. George B. Parr, and therein numbered Criminal 3866.

2. That a writ of prohibition be issued out of this Honorable Court prohibiting the Honorable Ben H. Rice, Jr., United States District Judge for the Western District of Texas, Austin Division, and the other judges and officers of the United States District Court for the Western District of Texas, and Malcolm R. Wilkey, Special Assistant Attorney General James T. Dowd, Special Assistant Attorney General, and Russell B. Wine, United States Attorney for the Western District of Texas, from exercising any jurisdiction over or proceeding any further in the case pending in the United States District Court for the Western District of Texas, Austin Division, entitled United States of America vs. George B. Parr, Criminal No. 3866, until the case pending on appeal in this court is finally determined in this court and in the Supreme Court of the United States

in the event a timely appeal should be taken by either party from this court to the United States Supreme Court.

3. That pending further order of the court herein, the Honorable Ben H. Rice, Jr., United States District Judge for the Western District of Texas, Austin Division, and the other judges and officers of said court, and Malcolm R. Wilkey, Special Assistant Attorney General, James T. [fol. 255] Dowd, Special Assistant Attorney General, and Russell B. Wine, United States Attorney for the Western District of Texas, be stayed or restrained from further proceeding in the United States District Court for the Western District of Texas, Austin Division, in the cause therein entitled United States of America vs. George B. Parr, Criminal No. 3866.

4. That the court grant to Parr such other and further relief as may be just in the premises.

Dated July 1, 1955.

Marvin K. Collie, Clyde L. Wilson, Jr., Esperson Building, Houston, Texas, Thomas E. James, Capital Natl. Bank Bldg., Austin, Texas, Everett L. Looney, Brown Building, Austin, Texas, Attorneys for the Petitioner.

[fol. 256] *Duly sworn to by Everett L. Looney. Jurat omitted in printing.*

ORDER GRANTING LEAVE TO FILE PETITION FOR WRITS OF MANDAMUS AND PROHIBITION

The foregoing motion for leave to file the petition is granted, and a rule is ordered to issue directed to the Honorable Ben H. Rice, Jr., United States District Judge for the Western District of Texas, Austin Division, and the other judges and officers of said court, and to Malcolm R. Wilkey, Special Assistant Attorney General, and James T. Dowd, Special Assistant Attorney General, and Russell B. Wine, United States Attorney for the Western District [fols. 257-270] of Texas, to show cause why the relief should not be granted as prayed.

The rule shall be returnable on the — day of ——, 1955, at — o'clock — m. when the parties will be heard upon

the question of the jurisdiction of the United States District Court for the Western District of Texas, Austin Division, to make the orders complained of and proceed further with the case of United States of America vs. George B. Parr, Criminal No. 3866, pending in the United States District Court for the Western District of Texas, Austin Division.

Dated July —, 1955.

——— ———, Judge.

[fol. 271] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 15612

GEORGE B. PARR, Appellant,

versus

UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court for the Southern District of Texas

ORDER DISMISSING APPEAL AND DENYING MOTION FOR LEAVE TO FILE PETITION FOR WRITS OF MANDAMUS AND PROHIBITION—July 13, 1955

Before HUTCHESON, Chief Judge, and CAMERON, Circuit Judge, and DAWKINS, District Judge.

By the Court:

This cause came on to be heard on the motion filed by appellee to dismiss the appeal in the above entitled cause, and on the reply of appellant thereto, and was taken under submission by the Court;

On consideration whereof, it is ordered that the motion to dismiss the appeal filed by the appellee in the above numbered and entitled cause be granted, and that said appeal be dismissed.

It is further ordered that the motion for leave to file petition for wits of mandamus and prohibition filed in this cause be, and the same is hereby, denied.

ORIGINAL FILED—July 13, 1955.

[fol. 272] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Title omitted]

JUDGMENT—July 13, 1955

This cause came on to be heard on the motion filed by appellee to dismiss the appeal in the above entitled cause, and on the reply of appellant thereto, and was taken under submission by the Court;

On consideration whereof, it is ordered that the motion to dismiss the appeal filed by the appellee in the above numbered and entitled cause be granted, and that said appeal be dismissed;

It is further ordered that the motion for leave to file petition for writs of mandamus and prohibition filed in this cause be, and the same is hereby, denied.

[fol. 273] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 15612

GEORGE B. PARR, Appellant,

versus

UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court for the Southern District of Texas.

OPINION ON MOTION OF APPELLEE TO DISMISS THE APPEAL AND ON MOTION FOR LEAVE TO FILE PETITON FOR WRITS OF MANDAMUS AND PROHIBITION—July 22, 1955.

Before HUTCHESON, Chief Judge, CAMERON, Circuit Judge, and DAWKINS, District Judge.

HUTCHESON, Chief Judge: This appeal is from an order dismissing, on motion of the United States, an indictment

in three counts returned against the defendant below, appellant here, in the Corpus Christi Division of the Southern District of Texas, and charging him within such division [fol. 274] and district with preparing and causing to be prepared false and fraudulent income tax returns for the years 1950, 1951, and 1952, and filing them with the Collector of Internal Revenue for the First Internal Revenue Collection District of Texas, by depositing and causing them to be deposited at the Corpus Christi Division Office. Giving notice of appeal from the order, defendant is here attacking it as erroneous and seeking its reversal.

The United States, proceeding under Rule 39(a), Federal Rules of Criminal Procedure, 18 U.S.C.A., "Supervision of Appeal in Appellate Court",[1] has filed a motion to dismiss the appeal on three grounds,[2] and the matter is before us on the motion to dismiss.

Supporting its motion by brief and argument and the citation of many authorities,[3] the United States urges upon us that the only kind of order having the requisite finality to support an appeal in a criminal case is one imposing a sentence and leaving nothing to be done but to enforce by execution what has been determined, and that the order in question determined nothing as to defendant's guilt or innocence. So urging, it insists: that whatever may be the merits of appellant's contentions as to the correctness or incorrectness

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[1] Cf. Semel v. United States, 158 F.(2) 229.

[2] These are: (1) that the order of dismissal is not appealable because not a final decision in a criminal case within the meaning of 28 U.S.C., Sec. 1291; (2) because, as the record shows, the defendant has been indicted in the Western District of Texas, and it is the intention of the government to prosecute that indictment to a final decision there; and (3) because the appeal is frivolous and obviously without merit, and is taken for the purpose of delay.

[3] Particularly Berman v. U.S., 302 U.S. 211; Cobbledick v. U.S., 309 U.S. 323; U.S. v. Swidler, 207 F(2) 47; Lewis v. U.S., 216 U.S. 611; Heike v. U.S., 217 U.S. 423; McLish v. Roff, 141 U.S. 661; Ex parte Altman, 34 Fed. Supp. 106; and U.S. v. John Doe, 101 Fed. Supp. 609.

of the judge's action in entering the order, those contentions are not, they cannot be, for decision here; and that, since the dismissal of the indictment determined nothing except that [fol. 275] it would be no longer prosecuted, the determination by us of defendant's contentions must await the entry of, and the appeal from, a final judgment.

On his part, the appellant, realizing that an ordinary dismissal on the motion of the United States of a pending indictment is not a final judgment from which an appeal will lie, is here insisting that the order appealed from is not such an order, and this appeal is not such an appeal. So insisting, he thus states his case:

> "It is the position of the accused that (1) the dismissal was filed during the trial without his consent, contrary to the provisions of Rule 48(a) Rules of Criminal Procedure, and (2) the order transferring the case from Corpus Christi Division to the Laredo Division, Southern District of Texas, pursuant to Rule 21(a) R.C.P., was res judicata of venue and effectively lodged exclusive jurisdiction of the offenses charged by the indictment against accused in the Laredo Division, Southern District of Texas. For these and other reasons stated below, the accused urges that the judgment of dismissal filed May 20, 1955, from which this appeal is prosecuted is an erroneous final decision of the District Court of the United States for the Southern District of Texas, Laredo Division, within the meaning of 28 U.S.C., Section 1291."

In support of his position, as thus stated, appellant cites no federal decision, there is none, holding that an order dismissing an indictment is appealable, none supporting his claim that under federal jurisprudence the order in [fol. 276] this case was a final and appealable order. Instead he cites cases dealing with non suits entered in civil cases such as *Cybur Lumber Co. v. Eckhart* (5 Cir.) 247 Fed. 284; *Mass. F. & M. Ins. Co. v. Schmick*, 58 Fed (2) 130; Cf. *Marks v. Feist, Inc.*, 8 Fed (2) 460; *Ruff v. Gay*, 67 F(2) 684; *Weeks v. F. & C. Co.*: 218 F(2) 503; and *Vaughan v. City Bank & Trust Co.*, 218 F(2) 802.

He further urges that the order, entered on defendant's

motion, transferring the case from the Corpus Christi to the Laredo Division for trial was res judicata as to the jurisdiction and venue of the prosecution of the defendant for the identical offense charged in the indictment in this case; that the court, therefore, was without authority to dismiss the case under Rule 48(a) Federal Rules of Criminal Procedure, 18 U.S.C.; that under the circumstances the only order of dismissal authorized is with prejudice forever terminating the prosecution of defendant for the offense charged; and that thus the order sought to be appealed from is invested with finality. He, however, cites no federal cases in support of this view. Instead he relies entirely upon decisions of state courts controlled by particular statutes or particular principle or theories of jurisprudence. Basic among them is the case of *Coleman v. State*, 37 So. 937, a Mississippi decision holding that *under a statute providing in effect that where an offense is committed in one or more counties that county where the offense was commenced, prosecuted or consummated, where prosecution shall be first begun*, shall have exclusive jurisdiction of the cause, the state could not, after having begun the prosecution in one county, dismiss the indictment and file it in another county. He also cites several civil cases from Texas, one of [fol. 277] them holding that under certain conditions interlocutory orders, though not appealable for want of finality, may be complained of on an appeal from a final judgment in the cause, *Coke v. Pottorff*, 140 SW(2) 586, and others that, under Texas Rules of Civil Procedure expressly so providing, appeals will lie from certain interlocutory orders.

As his final position, appellant, disputing appellee's claim that the appeal is frivolous, asserts that his claim of prejudice from the dismissal order is meritorious in that if the orders transferring the cause to the Laredo Division and then dismissing the indictment, did not constitute former jeopardy so as to prevent further prosecution, the order of transfer was a holding that he could be prosecuted only in that division and in legal effect prevents his being prosecuted in the Western District of Texas, or anywhere except in the Laredo Division of the Southern District.

Interpreting these contentions and arguments in terms of legal theory, they seem to be: that when, after lengthy hear-

ings, Judge Kennerly granted defendant's motion to transfer the case to Laredo, his ruling was a final and irrevocable adjudication that jurisdiction of the offense of defrauding the revenue was thereby exclusively vested in the Laredo Division of the Southern District of Texas; that it created in the defendant a vested right to be tried there, and there alone; and that, when the government presented the facts to a grand jury and obtained an indictment in the Western District of Texas, and then, as appellant claims, erroneously procured a dismissal of the indictment earlier obtained in [fol. 278] the Southern District, it in effect induced the court to enter an order depriving defendant of that right, and thus the order appealed from was invested with finality and was and became a final judgment. Thus, as it seems to us, presenting his position at once on the motion to dismiss and on the merits of the appeal and analogizing the dismissal of the indictment over his objection to a non suit in a civil case over the objection and to the prejudice of the defendant, the defendant argues quite contradictorily: (1) that this deprivation furnishes the element which at once invests the order with finality sufficient to make it appealable and requires its reversal; and (2) that if it stands unreversed, it has the effect of entitling him to an acquittal altogether.

We pass, without consideration or discussion of them, appellant's views on the merits, because, unless the order is final and we think it is not, the merits are not before us to take up and dispose of the only matter now before us, the finality *vel non* of the order here sought to appealed from.

We think it clear that none of defendant's claims that it is final are well taken, as bearing upon the finality of the order for the purpose of appeal. All that occurred in this case and the sole purport and effect of the order sought to be appealed from is simply that the United States has elected to discontinue, and has discontinued, the prosecution of the indictment returned in the Southern District of Texas, and that the order sought to be appealed from is therefore not final but discretionary and interlocutory and not appealable. *Semel v. United States*, 158 F(2) 233, and authorities cited [fol. 279] in note 3, *supra*. These, though not on all fours on their facts, do give insight into the problem of "finality"

presented here. They, together with Swift, 339 U.S. 684 and Cohen, 337 U.S. 541, indicate the general and consistent approach that an order is "final" only if it terminates the matter in controversy below. When a seemingly interlocutory order has been held appealable, it has been on the theory that irreparable injury will result from dismissal of the appeal or that the particular narrow issue with which the order was concerned is wholly separable from the remainder of the case and the order terminates the separable issue.

The matter put in controversy by the dismissed indictment was the defendant's guilt of the crime of tax evasion charged in it. That issue was never reached for determination, let alone determined, and under the controlling authorities cited, *supra*, the appeal must, therefore, be, and is hereby DISMISSED for want of finality in the order appealed from.

From these views that the order appealed from was not a final order and the court is without jurisdiction of this appeal to be followed by an order dismissing it, completely inconsistent as they are with the theory of protecting and preserving this court's jurisdiction, on which appellant's motion was filed in this cause, it follows that the motion for leave to file petition for writs of mandamus and prohibition must be, and it is, denied.

CAMERON, Circuit Judge: I dissent.

[fol. 280] CAMERON, Circuit Judge, dissenting:

I

In its opinion granting motion of appellant Parr to change the venue of the first indictment from the Corpus Christi Division, where it was brought, to the Laredo Division of the Southern District of Texas, the District Court said in part:

> "* * * substantially all of the persons who made such affidavits mention or refer to the publication of many articles about defendant in two newspapers published at Corpus Christi with large circulations in the Corpus Christi Division. Defendant has brought and offered in evidence clippings, etc. of a very large number of these articles or publications, extending over a period

of several years and on down, which I have studied. * * * [Later the Court estimated the number as between five and six hundred.] It is sufficient to say that the defendant has therein been given, during recent years, much publicity, unfavorable and sometimes most unfavorable. Such publications, generally with prominent headlines, are directly or indirectly with respect to defendant * * * and concern political matters, elections, law enforcement, taxation, etc., generally and in the town of San Diego and in Duval County, where defendant resides, and in some adjoining counties. They are also with respect to the killing at night of a young man at Alice, Texas, in connection with which defendant and persons associated * * * are mentioned. Also with respect to the stationing of Texas Rangers [fol. 281] in Duval County, the investigation by the Attorney General of Texas * * *. Also with respect to the impeachment of certain judicial and other officers thereof. Also with respect to many lawsuits filed on behalf of the State of Texas and the United States against defendant * * *.

"These publications whether standing alone or when considered in connection with such affidavits, support, strengthen and confirm my view that there is so great a prejudice against defendant in the Corpus Christi Division that he cannot obtain a fair and impartial trial there in this case."

It was in a jurisdiction pervaded by that atmosphere that the Government initiated this prosecution. In so doing, the Government's attorney asserted that a precedent, observed for twenty years, of bringing such prosecutions at Austin, was broken. Having the right to prosecute at several other points, it chose as the battleground upon which appellant's liberty would be decided a community in which the Government would have had all of the advantage and the appellant would have had a hard uphill fight.

[1] The matter is before us on appeal from order dismissing the first indictment and also on Petition for Mandamus and Prohibition and Motion to file same. Parr will be referred to in every instance only as appellant.

When the motion for change of venue was made the Government opposed the change and offered many affidavits in opposition to it. After an extended hearing in which the parties filed elaborate written briefs, the District Judge granted a change of venue based upon the conditions found by it to exist where the prosecution was brought.

[fol. 282] In commenting upon the transfer to the Laredo Division the District Court mentioned that the Government "did not, when the case was first submitted, claim that it could not obtain a fair and impartial trial at the Laredo Division, nor does it do so now. It says in its brief * * *, 'that the Government would be under a severe handicap in prosecuting this defendant in the Laredo Division'." The District Court then proceeded to describe certain political controversies as existing in the Laredo Division, appellant being in one political camp and some of the prosecuting witnesses being in the other. Having considered the showing fully, the District Court concluded, "I do not think that the evidence shows that the Government either will or might be under a severe handicap in the prosecution of this case as claimed. I find to the contrary". The carefully drawn opinion was written by retired District Judge Kennerly and concurred in by active Judge Allred.

That opinion was filed April 28, 1955 and five days later, May 3rd, the United States Attorney called the District Judge over long distance telephone advising that the Government desired to dismiss the first indictment because a new indictment had been returned in the Western District of Texas. He stated to the judge that he did not believe that the defendant could be heard on the matter under Rule 48. The regular District Judge ruled otherwise, however, and set the motion to dismiss for hearing before Judge Kennerly.

The motion to dismiss the first indictment was filed May 4, 1955 and with it was filed a copy of the new indictment returned in the Western District involving the same facts. [fol. 283] With it also was filed a written statement of reasons for the dismissal. The chief reason given was that the Government had chosen to present the new indictment in the Western District and that it had a right so to do, adding that new factors had been introduced in the situation:

"Among the recent factors weighing in the overall appraisal of where prosecution should be had should be mentioned the recent decision of the court to transfer venue from Corpus Christi to Laredo in the Southern District of Texas. This means that trial will be had in a division in which neither the taxpayer lives nor the Government chose originally to bring prosecution, and thus establishes a set of circumstances which was never in the contemplation of Government counsel at the time the original prosecution was brought in the Southern District of Texas."

The District Court for the Southern District conducted an extensive hearing on the Government's motion to dismiss the first indictment in which it heard an extended statement by the Government counsel and a like statement by one of appellant's counsel, and the Government counsel was subjected to a short examination by appellant's counsel.

From the statement of Government counsel and the testimony given by him, the chief articulated reason for the motion to dismiss the Corpus Christi indictment was that the Government did not feel that the witnesses for the Government would stand up as well in the Laredo Division as they would elsewhere. In his testimony, the attorney adverted to the fact that it was easier to make proof of venue [fol. 284] in the Austin Division (Western District), but his answers, on the whole, failed to sustain that contention. Here is an answer given by the attorney which may be taken as epitomizing the underlying reason for the Government's opposition to trying the case in the Laredo Division:

> "• • • the very fact that the case in the Southern District has now been transferred to Laredo, and the fact that testimony will have to be elicited from witnesses who are either reluctant or hostile makes—throws a different light on the Government's proof of venue, as it does on the Government's proof of other aspects of the case. I point out to you in that regard that Mr. Benson here, who was in the employ of Mr. Parr and signed the tax returns, was an employee of Mr. Parr and he has lived down in that area. Not going further into the case, but the change in the location affects the proof as to venue as it does the other facts of the Government's case. • • •

"As far as the basic facts are, we believe them to [be] the same; as far as the practical problem of proof in a lawsuit, the scene has been altered, the situation has been altered considerably by the shifting of the case from Corpus Christi to Laredo."

At another point in his testimony Government counsel thus summarized the attitude that the Government had the plain right to shift the scene of the trial and was merely exerting that right:

"I think it has been very clear from several documents that we have filed that we would have preferred [fol 285] the case to remain in Corpus Christi, and it is certainly clear from the action of the Attorney General and myself that the Attorney General prefers the case go to Austin, and believes, in the exercise of his office as the chief prosecutor, it ought to be prosecuted there in Austin."

The Judge for the Southern District made it clear in his brief opinion what influenced him to grant the motion to dismiss:

"Now we come to this motion by the Government to dismiss the case because of the fact that a new indictment covering the same matter has been presented in the Western District. * * * Evidently there is some discretion in the court as to the matter of whether the case should or should not be dismissed.

"In twenty-four years on the bench in this district, I do not recall ever having at any time hesitated to dismiss a case when requested by the Government. That was, of course, under the old law, and[2] under the present rules. If I have a discretion under the rules now as to whether this case should or should not be dismissed, I must exercise that discretion and allow it to be dismissed, because I do not think that the defendant, either in the hearing this morning or in this enormous record on the question of change of venue, has shown

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[2] It is evident that the transcript omits the word not at this point.

any reason why the case should not be dismissed . . . I am going to dismiss this case as requested by the Government."

[fol. 286] Appellant prosecuted an appeal from the judgment entered dismissing the former indictment, and briefs have been filed and that case stands on our docket for decision in due course.

Thereafter on May 31, 1955 the Government called up criminal case 3866 in the Austin Division of the Western District of Texas, the new indictment, and appellant filed a motion to stay proceedings therein until the appeal could be disposed of. That motion was overruled and appellant filed a motion to transfer the second indictment to the Laredo Division of the Southern District for trial, which was likewise overruled. The District Court for the Western District of Texas thereupon set the new indictment for trial July 18, 1955. Immediately thereafter appellant filed in this court a Petition for Mandamus and Prohibition together with motion for leave to file the same, and the Government has filed its opposition thereto along with a motion to dismiss the appeal.

II

I think leave should be granted that the Petition for Mandamus and Prohibition be filed and that an order should be entered at least holding these complex proceedings in *status quo* until the appeal may be heard in due course, and the proceedings can be carried on in an orderly fashion preserving the rights of the appellant and the Government alike. The majority holds that the appellant is entitled to no relief at all, based chiefly upon the ground that it is conceived that appeal does not lie from the order dismissing the first indictment. I think that the appealability of that order presents a serious question. Under the recent de-[fol. 287] cisions of the Supreme Court in *Swift, etc. Co. v. Compania, etc.*, 339 U.S. 684, and *Cohen v. Beneficial etc. Co.*, 337 U.S. 541, and our decision in *Tomlinson v. Poller*, 220 F.2d 308, there is a probability that appeal does lie from this order. But I see no reason to decide this question now. The Government has offered no explanation at all for its great haste in bringing its indictment returned in May to

trial at once. The events forming the basis of the prosecution occurred between four and six years ago. There is no reason why the appeal should not be heard in due course by this court, having the benefit of oral argument of counsel and leisurely study of the briefs.

III

But we have ample power to deal fully with this situation even if that order is not appealable and there is precise precedent for such a course. In *Atlantic Coast Line R.R. Co. v. Davis*[3], we sustained Mandamus and Prohibition as proper means for arresting proceedings in order that justice might be done with respect to a non-appealable order. We gave as a reason (185 F.2d 768) for allowing the extraordinary writ that the situation was of such a nature as "renders the likelihood of any fair and effective correction of the action of the Court by subsequent appeal * * * highly improbable, if not impossible". [Citing cases.] The same is true here as regards the probability of correcting, after possible conviction on the second indictment, any error which may have been made in permitting dismissal of the first [fol. 288] indictment. And we noted further that the allowance of the writ was in "aid and maintenance and protection of this Court's appellate jurisdiction." A District Court in Florida had entered an order under 28 U.S.C.A. 1404(a) transferring a civil action to another district for trial. Appeal did not lie from that order.[4] Nevertheless we allowed Petition for Mandamus and Prohibition to be filed and ordered the District Court to vacate the transfer order and to proceed with the trial of the case. If the facts justify it, we can grant full and appropriate relief here.

I think the facts do justify it. I would not state my reasons for dissent if I did not feel that this record presents an important question of procedure whose protection appellant is entitled to invoke and whose definition the bench and bar

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[3] 5 Cir. 1950, 185 F.2d 766, Petition for leave to file mandamus, etc. denied by Sup. Ct. 340 U.S. 941, and the cases cited and see 28 U.S.C.A. 1651(a) and the additional cases collected in the article cited in Note 6 *infra*.

[4] Crummer et al v. duPont, et al, 5 Cir. 1952, 196 F2d 468.

are entitled to have. It is the duty of the courts to hold the scales of justice in equal balance between the Government and a citizen charged with crime in exactly the same manner as those scales are held in litigation between two private individuals.

An instinctive feeling of doubt arises whether these proceedings would be attended with the same results if they were between two private litigants. Suppose private litigant A had sued private litigant B in a civil action and had chosen to lay the venue in the Corpus Christi Division. B came along and filed a motion to transfer to the Laredo Division under 28 U.S.C.A. 1404(a). After an extended hearing and over the opposition of A, an order was entered transferring the case to the Laredo Division.[5] Without [fol. 289] waiting for a week to pass, litigant A sought out another forum and there served the same complaint on litigant B proceeding back to the original jurisdiction with the request that the original civil action be dismissed solely on the ground that A did not feel that his witnesses would stand up as well in the jurisdiction to which the transfer had been made. It is not hard to visualize the effectiveness with which counsel could declaim that the processes of the courts were being trifled with to harass litigant B.

With respect to civil litigation, it has been said that, prior to the passage of 28 U.S.C.A. 1404(a), venue was the "prime prerogative of plaintiffs".[6] It was pointed out that this Act of Congress had transferred some of that prerogative to the defendant and a large portion of that prerogative to the court, to be used by the court in deciding questions of venue on the basis of fairness to both parties. It was further pointed out that the courts have almost universally exercised that prerogative to see to it that the rights of both the parties are protected without advantage to either.

Does not Rule 48(a) have a similar effect with respect to

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[5] Of course, the case here is stronger for appellant. The transfer here was from a point where prejudice palpably existed in favor of one litigant to a point where prejudice did not exist for or against either litigant.

[6] "*Forum Non Conveniens* and 28 U.S.C.A. 1404(a)": 23 Miss. Law Journal p. 1 (December, 1951).

criminal prosecutions? Are we to assume, as the court below manifestly assumed, that venue is still the prime prerogative of prosecutors to be used in a situation like this one to gain an advantage for the Government or to escape from a position of less advantage in which the Government found itself as the result of its own election?

[fol. 290] I do not think so. Prior to the adoption of the new rule, the Government had a free hand and had used it freely. The court below stated in its opinion that in more than twenty years it had never refused the Government in its request for dismissal and it is reasonably clear that this unbroken practice was decisive in its mind.[7] If that is still the law, the innovation in the Rules of Criminal Procedure requiring an order of court before an indictment could be dismissed would be meaningless and without purpose.[8] The

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[7] Besides indicating its feeling that the Government still had, under Rule 48, practically an absolute right to dismiss the Court indicated further that, in the hearing of such a motion the defendant had the burden of proving that the indictment should not be dismissed. Both assumptions represent misconceptions of the law. The Government, seeking affirmative action by the Court, carried the burden of showing that there was some valid legal reason for the dismissal.

[8] The Notes of the Advisory Committee, 18 U.S.C.A. pp. 537-8, contain this comment:

"The first sentence of this rule will change existing law. The common law rule that the public prosecutor may enter a nolle prosequi in his discretion, without any action by the court, prevails in the Federal Courts. * * * This provision will permit the filing of a nolle prosequi only by leave of court. This is similar to the rule now prevailing in many states. * * *"

The Advisory Committee had recommended that the right to dismiss be left with Government attorneys with the requirement that written reasons be given. But the Supreme Court rejected that recommendation and inserted the requirement for court approval.

Even before the passage of this rule, one District Court had held that the Court had the power, in the exercise of a judicial discretion, to refuse a requested dismissal, U.S. v. Krakowitz, D.C. Ohio, 1943, 52 F. Supp. 774.

manifest basis for the change in procedure was that the Supreme Court, with Congressional approval, was doing with respect to criminal prosecutions, what Congress had done with respect to civil actions: it was taking the choice of venue out of the unfettered hands of the litigants and giving it to the courts to be exercised in a way which would insure justice and equal treatment to all parties.[9]

[fols. 291-292] If that was the purpose and if that is the meaning of the rule, then there is grave doubt whether that purpose and that meaning have been vindicated here. There is no way the Government can escape the conclusion that its actions here were taken in an effort to select a forum in a locale where the atmosphere would be favorable to the Government and not to the defendant.[10] No criticism is

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[9] Few cases are cited by counsel and they are not of much help. Two federal cases are brought to our attention, United States v. Haupt, C.A. D.C., 152 F.2d 771, and United States v. Jones, 7 Alaska 378, and both speak in condemnatory terms of the practice of multiple indictments. The practice of dismissing an indictment in order to proceed under a new one in a more favorable climate is condemned in several state court cases, notably Ex Parte, Lancaster, Ala. 1921, 89 So. 2d 721, State v. Milano, La. 1916, 71 So. 131, and Coleman v. State, Miss. 1904, 35 So. 937.

[10] The Government's attorney had said this, in stating to the District Court the reasons the Government desired the order of dismissal: "These witnesses, in most instances, are reluctant, and in some instances are hostile. We feel that the trial of the case in Laredo, close to the defendant's seat of political power and his associations there, would have an adverse effect on eliciting the truth from the witnesses the Government will be forced to bring in order to establish this case. * * *"

The Atlas shows that Laredo is in Webb County and San Diego is in the adjoining County of Duval, and that the two Cities are rather close together. It further shows that Austin is more than one hundred miles away from San Diego. Students of the problem of law enforcement largely agree that government functions at its best at the local level, and that prosecutions are likely to bring more just results

directed to such a course. Litigants from time immemorial have jockeyed for positions of advantage and have shopped about in an effort to light upon the most favorable venue situation for their own success. But courts have to be blind to such machinations. They must weigh the facts of the [fol. 293] case before them and give judgment based upon the rights of the parties contending as equals and upon a battleground which favors neither.

The Government made its selection of the battleground in the first instance as it had a right to do. The court found that battleground to be too favorable to the Government and unfair to the defendant. The court changed the battleground to one it adjudicated to be favorable to neither side.[11] To permit the Government, under those circumstances, to repudiate the whole proceeding it had initiated and to move the scene of the fight to another place of its own selection is to open the door to the possibility of grave abuses. Further, such a course would deny appellant rights which he is entitled to have the courts protect.

If it be thought that the views here expressed give hospitality to the concept that the Government does not belong

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when they are conducted where the defendant and the witnesses are known and where the difficult question of law enforcement has its most direct impact. The vast majority of criminal prosecutions are conducted in such an atmosphere. Jurors who have no acquaintance with the defendant or the witnesses and who do not have a knowledge of all of the facts and circumstances surrounding the problem of the enforcement of the law—such as would inevitably be the case in a district so far removed from the site of the happenings forming the basis of the prosecution—are at a great disadvantage.

In passing on the Government's contentions that it would be under a disadvantage in a trial at Laredo, which it had presented fully on the motion for change of venue, the District Court had ruled directly that the Government would not be under a disadvantage there.

[11] It is true that the battleground was the choice of the defendant, but the Court found that the rights of the Government would not be prejudiced in the Laredo Division.

in a favored-litigant class, they are so intended. The mass of litigation, both civil and criminal, to which the Government is party is sufficient to cause the courts increasingly to give most careful scrutiny to the status of the Government as a litigant. In the very nature of things, the Government enters every contest with a citizen with a distinct [fol. 294] advantage.[12] Moreover, all who have not been blind must know that it has frequently been treated as a favored litigant. That is not as it should be. When the Government enters litigation with its citizens, it must stand as as equal and, must toe the same mark private litigants

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[12] This thesis was well developed by a paper entitled "The United States as a Litigant," read May 30, 1952 to the Judicial Conference for the Fifth Circuit, and a part of the records of that Conference, by Hon. Robert B. Troutman of Atlanta, Georgia. Here is an excerpt from that paper:

"With this vast power, and these tremendous resources, the United States is, indeed a formidable adversary * * * The ordinary citizen stands in awe when confronted with such litigation. * * * It is a Goliath, a giant in power, whose challenge a modern Saul and all his Captains might with good reason hesitate to accept. More often than not, however, the citizen has no choice. The initiative is on the side of the Government.

"The odds apparently are uneven. * * * He is assured, however, that the end and aim of his Government is the protection of his freedom and his 'rights'. In an even broader sense, justice to the individual is its aim. History tells him that those 'rights' were established by litigants with the courage to combat tyrants who sought to deny them, before judges who had the courage to uphold them. In such contests our profession has supplied both the adversary advocates and the judges. The latter have been set apart and charged with responsibility of seeing that justice be done to the individual and to the Government. * * * The seal of the Department of Justice to which they belong contains a motto, '*Qui pro Domina Justitia Sequitur*'. It appears on the flag which flies over the Department's office. Liberally translated, 'The Department of Justice Prosecutes In Behalf Of Our Lady Justice'."

must come to. It is hard to conceive that a private litigant could make a test run in one jurisdiction and fail, and then start a proceeding in another jurisdiction and get his action to trial on the merits with such speed while, at the same time, the former action was pending and undisposed of, or was improperly dismissed.

IV

The Government takes the position that appellant has no stake in the continued pendency of the prosecution first brought. That position is untenable. If it should be held that the motion to dismiss that indictment should have been overruled, the parties litigant will have two cases pending in separate jurisdictions and involving the same subject matter. The respective courts called upon to deal justly as between the parties will exercise their respective discretions, having due regard for the dictates of justice as well as for the comity usually observed in such matters.[13] We [fol. 295] so held in *Illinois Central v. Bullock*, 5 Cir. 1950, 181 F. 2d 851. The Government argues that, under *Carpenter v. Edmonson*, 5 Cir. 1937, 92 F. 2d 895, the District Court for the Western District of Texas would have no discretion but to proceed to hear the case it elected to press. That argument too is unsound. The *Carpenter* doctrine was considerably weakened by *McLain v. Lance*, 5 Cir. 1944, 146 F. 2d 341, and was repudiated in the *Bullock* case, *supra*. The law now is that each judge called upon to try a case pending also in another jurisdiction has the right and duty to exercise a judicial discretion as to whether the case will be tried or not.

If that situation should come to pass, it would be incumbent upon the District Court for the Southern District of Texas, and the District Court for the Western District of Texas each to exercise discretion as to which case should be tried. It may be that discretion so exercised would lead to the conclusion that the cases should be disposed of in the order of their filing. That would not be inconsonant with

[13] Cf. Lydick v. Fischer, 5 Cir. 1943, 135 F. 2d 983.

practices frequently observed.[11] The two courts would, of course, exercise discretion according to their own judgments. The suggestion is made merely to indicate that the Government's argument is wrong and that appellant does have a definite legal interest in the continued pendency of the first prosecution.

V

It is plain that we have all elements of this controversy before us and are able to do full justice to the parties independently of the question of the appealability of the dis- [fol. 296] missal order. It is clear that the Court of the Southern District applied the wrong tests in deciding that the indictment first brought might be dismissed. If it had required the Government to establish a sound legal reason for the dismissal, giving due consideration to the rights of both parties, it is difficult to conclude that the right to dismiss would have been sustained, so barren is the record of any such showing. When all of the talk is boiled down, it points to the fact that the Government was wholly displeased with the prospect of a trial in a venue the court had adjudicated to be fair.

That judgment transferring the case to the Laredo Division had been reached after full hearing and at manifestly great expense to the Government and appellant. To permit the Government to turn its back upon the entire proceeding conducted in a venue of its own selection, giving it, at the same time, a second choice of venue, and to put the appellant to trial with the added expense which would obviously be entailed, would, under the facts clearly appearing in the record before us, be unjust and in derogation of appellant's rights.

The authorities discussed in III *supra* furnish a clear blueprint of means by which we may do full justice between the parties. I think we should permit the Petition for Mandamus and Prohibition to be filed, and should take full charge of the entire litigation, either (a) preserving the *status quo* while proceeding to hear the appeal on its merits;

[11] Cf. Niehaus, et al v. Magnolia Textiles, 5 Cir. 1949, 175 F. 2d 977, and the companion case, Magnolia Textiles, Inc. v. Gillis, et al, Sup. Ct. Miss. 1949, 41 So. 2d 6.

or (b) reversing the dismissal order for rehearing by the Court of the Southern District guided by proper standards of proof and decision; or (c) ordering that the case in the [fol. 297] Western District be transferred to the Southern District and consolidated with the case originated there, and that trial proceed in the Laredo Division. By following one of these alternatives or a combination of them, we can proceed to grant appellant the protection to which I think he is entitled and can dispense justice which will be effective and not sterile.

These are the grounds of my dissent.

[fol. 298] Clerk's Certificate to foregoing Transcript omitted in printing.

[fol. 1] In the United States District Court for the Western District of Texas, San Antonio Division

No. 3866 Cr. (Austin) Cr. No. 20825

United States of America

v.

George B. Parr

Indictment—Filed in Clerk's office May 3, 1955

The Grand Jury Charges:

That on or about the 15th day of March, 1950, within the Austin Division of the Western District of Texas, and within the jurisdiction of this Court, one George B. Parr, late of San Diego, Texas, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America for the calendar year 1949, by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of Texas, at Austin, Texas, a false and fraudulent income tax return wherein he stated that his net income for said calendar year was the sum of

$49,075.04, and that the amount of tax due and owing thereon was the sum of $22,615.39, whereas, as he then and there well knew, his net income for the said calendar year was the sum of $96,457.96, upon which said net income he owed to the United States of America an income tax of $56,050.46.

[fol. 2] In violation of Section 145(b), Internal Revenue Code; 26 U.S.C., Section 145(b).

Second Count

That on or about the 15th day of March, 1951, within the Austin Division of the Western District of Texas, and within the jurisdiction of this Court, one George B. Parr, late of San Diego, Texas; did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America for the calendar year 1950, by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of Texas, at Austin, Texas, a false and fraudulent income tax return wherein he stated that his net income for said calendar year was the sum of $70,599.46, and that the amount of tax due and owing thereon was the sum of $38,312.60, whereas, as he then and there well knew, his net income for the said calendar year was the sum of $112,114.46, upon which said net income he owed to the United States of America an income tax of $70,570.76.

In violation of Section 145(b), Internal Revenue Code; 26 U.S.C., Section 145(b).

Third Count

That on or about the 17th day of March, 1952, within the Austin Division of the Western District of Texas, and within the jurisdiction of this Court, one George B. Parr, late of San Diego, Texas, did wilfully and knowingly attempt to evade and defeat a large part of the income tax [fols. 3-4] due and owing by him to the United States of America for the calendar year, 1951, by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of Texas, at Austin, Texas, a false and fraudulent income tax return

wherein he stated that his net income for said calendar year was the sum of $44,698.31, and that the amount of tax due and owing thereon was the sum of $22,628.23, whereas, as he then and there knew, his net income for the said calendar year was the sum of $70,713.86, upon which said net income he owed to the United States of America an income tax of $42,589.37.

In violation of Section 145(b), Internal Revenue Code; 26 U.S.C., Section 145(b).

(S.) G. Bedell Moore, Foreman of the Grand Jury,
(S.) Russell B. Wine, United States Attorney.

[fol. 5] IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION

[Title omitted]

MOTION BY DEFENDANT TO STAY ARRAIGNMENT AND ALL SUBSEQUENT PROCEEDINGS—Filed in Clerk's office May 25, 1955

The defendant moves that the arraignment and any and all subsequent proceedings herein be stayed until final disposition of a case pending against him in the United States District Court for the Southern District of Texas, Laredo Division, entitled United States of America vs. George B. Parr, Chemical Action No. 6011, on the following grounds:

I

That an indictment identical except as to venue allegations with the indictment in this pending case was returned against this defendant in the Southern District of Texas, Corpus Christi Division, on November 15, 1954, being docketed as Criminal No. 6011, entitled United States of America vs. George B. Parr.

That the defendant George B. Parr was arraigned by Judge James V. Allred in the United States Courthouse at Corpus Christi on December 1, 1954, at which time he entered a plea of "not guilty."

[fol. 6] Within the time permitted by law and the orders of the Judge of said Corpus Christi Division, the defendant

George B. Parr on January 3, 1955, filed (1) his Motion for a Bill of Particulars, (2) his Motion for Discovery and Inspection, (3) his Motion for Subpoena Duces Tecum, and (4) his Motion to Change the Venue in this case under Rule 21(a) of the Federal Rules of Criminal Procedure from the Corpus Christi Division to the Laredo Division for trial. The Government joined issue on all these motions and they were taken under submission by the Court after the Court had first received evidence in the form of affidavits and counter-affidavits in support of and against the Motion for Change of Venue.

On April 27, 1955, a Memorandum by Judge T. M. Kennerly, concurred in by Judge James V. Allred, disposed of the aforesaid motions, which Memorandum was filed with the Clerk of the Corpus Christi Division on April 28, 1955. Formal orders directed by the Memorandum were entered on May 16, 1955, ordering the Government to furnish defendant with the particulars therein noted, ordering the Government to produce and permit inspection by defendant as therein set out, denying defendant's motion for subpoena duces tecum and transferring the case from the Corpus Christi Division, Southern District of Texas, to the Laredo Division, Southern District of Texas, for trial.

II

The indictment in this pending case was returned on [fol. 7] May 3, 1955.

On May 4, 1955, the Government under the authority of Rule 48(a) of the Federal Rules of Criminal Procedure filed with the Clerk of the Corpus Christi Division, Southern District of Texas, a Motion for Leave to Dismiss the Indictment then pending in the Southern District of Texas, Corpus Christi Division, ordered transferred to the Laredo Division, against George B. Parr, Criminal No. 6011. Attached to the Motion so filed was an authorization from the Attorney General and a Statement of Reasons for Dismissal.

On May 16, 1955, the defendant George B. Parr filed his Opposition to Government's Application for Leave to Dismiss and a hearing was thereupon had before Judge T. M. Kennerly to whom it was submitted by direction of Judge

James V. Allred by his Memorandum dated May 4, 1955.

The hearing before Judge Kennerly on said Motion to Dismiss and Defendant's Opposition thereto having been concluded, an order was entered without the consent and over the objection of defendant dismissing the case then pending in the United States District Court for the Southern District of Texas, Laredo Division.

III

On May 20, 1955, defendant George B. Parr in Criminal 6011 pending in the Southern District of Texas, Laredo Division, took an appeal from the Judgment of Dismissal entered by Judge T. M. Kennerly on May 19, 1955, to the Court of Appeals for the Fifth Circuit by filing with the [fol. 8] Clerk a Notice of Appeal in duplicate, Bond for Costs and Designation of Record on Appeal and by paying the fees, all in the manner and within the time prescribed by law and the Federal Rules of Criminal Procedure, and the Court of Appeals for the Fifth Circuit now has jurisdiction of said case.

(S.) Everett L. Looney, 1020 Brown Building, Austin 1, Texas. (S.) Thomas E. James, Capital Natl. Bank Bldg., Austin, Texas. (S.) Marvin K. Collie, Esperson Building, Houston, Texas. (S.) Clyde L. Wilson, Jr., Esperson Building, Houston, Texas, Attorneys for Defendant.

Duly sworn to by Everett L. Looney. Jurat omitted in printing.

[fols. 9-10] NOTICE OF MOTION (omitted in printing)

CERTIFICATE OF SERVICE (omitted in printing)

[fol. 11] IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION

Criminal No. 3866

UNITED STATES OF AMERICA,

vs.

GEORGE B. PARR

TRANSCRIPT OF EVIDENCE—June 7, 1955

Be it remembered that on the 7th day of June, 1955, at 1:30 p.m., in the San Antonio Division of the United States District Court, Western District of Texas, before the Honorable Ben H. Rice, Jr., Judge of said court, there came on to be heard defendant's motion to stay arraignment and all subsequent proceedings, whereupon the following evidence was introduced and the following proceedings were had:

APPEARANCES:

Mr. Malcolm R. Wilkey, United States Attorney, Houston, Texas; Mr. James T. Dowd, Assistant United States Attorney, Houston, Texas, appearing on behalf of the Government;

Looney, Clark & Moorhead, Austin, Texas, by Mr. Everett L. Looney and Mr. Thomas E. James appearing on behalf of the Defendant.

[fol. 12] COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Mr. Looney, are you ready to proceed?

Mr. Looney: Yes, sir.

The Court: All right, sir.

Mr. Looney: Your Honor, the matter to be submitted is the——

The Court: Mr. Looney, will you come up a little closer. It is difficult for me to hear you.

Mr. Looney: The matter to be considered is the first matter, and I hope the only matter to be considered this afternoon, is the motion which we filed on behalf of the

defendant George Parr; some few days prior to May 31st, the defendant filed a motion to stay the arraignment and all proceedings subsequent thereto. Subject to that motion and only in the event that it is overruled, he filed a motion to dismiss.

On May 31st, the defendant George B. Parr appeared at the bar, and by reason of the fact that Your Honor was busily engaged in trying a jury case, he was arraigned without the presentation first of the motion to dismiss, with the statement that such arraignment would be without prejudice to the presentation of the motion to stay and the motion to dismiss, if we reach that point.

Your Honor, a brief review of this case might be in order. On November 18th, 1954, the defendant Parr was indicted in the Corpus Christi Division of the Southern District for alleged violation of the income tax laws. On December 1st, 1954, the defendant George B. Parr was arraigned in the [fol. 13] Corpus Christi Division in the Southern District, and entered a plea of not guilty, after the court had first stated that he would be given until January 3rd within which to file any motions that he might think proper to be filed and to be considered. On January 3rd, 1955, the defendant filed a motion for a bill of particulars, a motion for production and inspection of documents, a motion for subpoena duces tecum and a motion to change the venue from the Corpus Christi Division to the Laredo Division in the Southern District, and at the same time the court had fixed limitation on the time of the defendant to file these motions, namely, January 3rd, he provided that the Government should have until January 24th within which to reply to any motion, or any briefs in support of any reply, if they so desire.

The defendant's motions were timely filed, all four of those motions, on January 3rd. Prior to January 24th, the court of his own motion entered an order extending the time both from the standpoint of the defendant and the Government, so that—I have forgotten the expiration date. Finally, all motions were submitted on briefs and affidavits, affidavits only as to the latter motion, the motion to change venue; the other is unsupported by affidavit to Judge Kennerly, for his decision. And on April 27th of this year,

Judge Kennerly handed down a memorandum opinion in which he disposed of all the pending motions, granted in part and declined in part the motion for bill of particulars, [fol. 14] granted in part and refused in part the motion for discovery and inspection, withheld action on the motion for subpoena duces tecum until such time as it was sought by the defendant after compliance with the inspection and copying of the instrument, production, inspection, and copying, unless they thought then they still needed a subpoena; and then he gave them the right to renew his motion at that time if he saw fit. And he sustained the motion to transfer the venue from Corpus Christi to Laredo and directed in his memorandum that orders should be entered in accordance with his written memorandum. That was April 27th.

That memorandum was filed in Corpus Christi on April 28th, 1955, and on May 3rd, if my memory serves me correctly, the same matters were submitted by the United States Attorney to the grand jury in session in the Western District at San Antonio, and an indictment identical in terms with the Corpus Christi indictment was returned by this grand jury here for the Austin Division, with the exception that some of the venue allegations had been deleted in the indictment that was returned here.

I make this preliminary statement because I think you can get it in this brief statement; it will help you understand and save time when we offer in support of our motion to dismiss some documentary evidence, which we do want to offer at this time before we argue.

Now, here is a list, if I might hand it up to the Court, a [fol. 15] list of the exhibits which we wish to offer.

Your Honor, the defendant offers as his Exhibit A the copy of the indictment that was returned in the Southern District of Texas, Corpus Christi Division, on November 15th—I stated a moment ago the 18th; it is November 15th, 1954. It isn't certified, but we had a pretrial discussion with the attorneys for the Government when we were last here, and it is agreed that it is a true copy of the indictment.

The Court: Is it so stipulated?

Mr. Wilkey: Your Honor, it is our position in regard to all of these documents, in regard to the proceeding in the

Southern District of Texas, that they are irrelevant to any proceeding in the Western District, for the simple reason, as shown by our authorities, a copy of which has been handed to the Court and to opposing counsel, that even if a proceeding was still pending and had not been dismissed in the Southern District, that that affords no bar to the proceeding going forward in the Western District. For that reason we consider them irrelevant. However, we have, in the interest of economy of time of both Court and counsel, and economy of money also, we have gone over these documents at the time you were over here on the 31st, I believe, and we are willing to agree, if assured that they are the same documents we examined, that they are true copies of the ones on file in the Southern District. We object to their legal relevancy or admissibility here.

[fols. 16-37] The Court: I will admit them.

Mr. Wilkey: They are true copies.

[fol. 38] DEFENDANT'S EXHIBIT I

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS, CORPUS CHRISTI DIVISION

Criminal Action No. 6011

UNITED STATES OF AMERICA, Plaintiff

vs.

GEORGE B. PARR, Defendant

AMENDED MOTION OF DEFENDANT UNDER RULE 21(a) FEDERAL RULES OF CRIMINAL PROCEDURE FOR TRANSFER OF CASE FROM CORPUS CHRISTI DIVISION TO LAREDO DIVISION FOR TRIAL

To the said Honorable Judge of said Court:

Comes now the defendant, George B. Parr, by his attorneys, and upon the following grounds moves the Court under authority of Rule 21(a), Federal Rules of Criminal Procedure, for an order transferring the above numbered

and entitled case to the Laredo Division of the Southern District of Texas, so that all further proceedings in the matter, including trial, may be had in the Laredo Division, Southern District of Texas.

I

(a) This Division is composed of Aransas, Bee, Brooks, Duval, Jim Wells, Kennedy, Kleberg, Live Oak, Nueces and San Patricio Counties.

[fol. 39] The total population of the counties composing the Division is, according to the last preceding Federal Census, to-wit, 1950, 308,245, of which 165,471 reside in Nueces County, the county in which Corpus Christi is located.

Within said Division, since prior to 1948 and at all times subsequent thereto, The Corpus Christi Caller and The Corpus Christi Times have been and are the principal media of news.

The counties in the division, according to the last Federal Census, and the combined daily circulation of the Corpus Christi Caller and the Corpus Christi Times within each such county, according to the latest A. B. C. report made by the publishers of such newspapers on September 30, 1953, follows:

County	Population	Circulation
Aransas	4,252	698
Bee	18,174	1,221
Brooks	9,195	811
Duval	15,643	1,259
Jim Wells	27,991	3,024
Kennedy	632	
Kleberg	21,991	3,748
Live Oak	9,054	373
Nueces	165,471	59,076
San Patricio	35,842	5,886

From the foregoing, it appears that one of every 6 persons in Aransas County, one of every 15 persons in Bee County, one of every 11 persons in Brooks County, one of every 12 persons in Duval County, one of every 9 persons in Jim Wells County, one of every 6 persons in Kleberg County, one of every 24 persons in Live Oak County, one of less than 3 persons in Nueces County, and one of every [fol. 40] 6 persons in San Patricio County receive one or both of said newspapers daily.

One out of less than every 4 persons in the Corpus Christi Division receives one or both of said newspapers daily.

(b) The counties in the Laredo Division, according to the last Federal Census, and the combined daily circulation of the Corpus Christi Caller and the Corpus Christi Times within each such county, according to the latest A.B.C. report made by the publishers of such newspapers on September 30, 1953, follow:

County	Population	Circulation
Jim Hogg	5,389	229
LaSalle	7,485	.....
McMullen	1,187	.....
Webb	56,141	118
Zapata	4,405	.....

From the foregoing, it appears that one of every 24 persons in Jim Hogg County, no persons of 7485 in LaSalle County, no persons of 1187 in McMullen County, one of every 475 persons in Webb County, and no persons of 4405 in Zapata County receive one or both of said newspapers daily.

One out of every 206 persons in the Laredo Division receives one or both of said newspapers daily.

(c) These newspapers have continuously carried on, since prior to 1948, and now carry on a campaign of hate, vilification and abuse, consisting of published defamations, innuendos, distortions, half-truths, untruths and plain lies, directed at this defendant, all as will be hereinafter shown this Court at or before the hearing on this motion.

(d) Additionally, since February 18, 1948, there has [fol. 41] been continuously published within and circulated throughout this Division an English-Spanish weekly newspaper, called "La Verdad," of which one Santos de la Paz is editor and publisher. This last named publication has been during all such period of time likewise engaged in a campaign of hate, vilification and abuse, consisting of published defamations, innuedoes, distortions, half-truths, untruths and plain lies, directed against this defendant, even to the extent, as illustrative, of devoting two of its four pages, being the entire front page and the back page, of its February 5, 1954, issue, to convicting, by the means aforesaid, in the eyes and minds of its readers, this defendant, not only of the offense with which he stands charged in this

Court, but also of other and different offenses against the United States of America and the State of Texas, all as will be hereinafter shown this Court at or before the hearing on this motion.

II

For approximately two years next preceding the return of the indictment herein, agents of the Bureau of Internal Revenue, the Federal Bureau of Investigation, the United States Postal Service, the Department of Justice, the Attorney General of Texas, the Department of Public Safety, the State Auditor and numerous other boards and bureaus, unknown to this defendant but well known to the Government, have blanketed the whole, or practically the whole, of this entire Division purportedly, if not actually, attempting to convict this defendant in the eyes and minds of the inhabitants herein of every offense coming within [fols. 42-43] their respective jurisdictions.

III

The combination of all of the foregoing has created throughout this Division an inflammatory atmosphere by reason of which the defendant, if tried here, will be denied a fair and constitutional trial, since there exists in this Division and in each and every county comprising same so great a prejudice against this defendant that he cannot obtain a fair and impartial trial in this Division.

Written sworn statements of citizens residing in each county in the Division, supporting this paragraph III, will be presented at or before the hearing on this motion.

IV

Substantially the same conditions exist in the Brownsville Division, the Galveston Division, the Houston Division and the Victoria Division.

Dated this — day of January, 1955.

Respectfully submitted, Everett L. Looney, 1020 Brown Building, Austin 1, Texas; Thomas E. James, 1302 Capital National Bank Building, Austin, Texas; Marvin K. Collie; Clyde L. Wilson, Jr., Esperson Building, Houston 2, Texas, Attorneys for Defendant.

[fol. 44] (Filed in due course of time on Feb. 15, 1955. V. Bailey Thomas, Clerk.)

DEFENDANT'S EXHIBIT J

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, CORPUS CHRISTI DIVISION

Criminal No. 6011

UNITED STATES OF AMERICA,

v.

GEORGE B. PARR

REPLY TO DEFENDANT'S APPLICATION FOR CHANGE OF VENUE

Now comes the United States of America, by Malcolm R. Wilkey, United States Attorney for the Southern District of Texas, and in reply to application for change of venue of defendant, George B. Parr, would respectfully show the Court the following:

1. The defendant makes two basic assertions:

(1) That he cannot secure justice at Corpus Christi, and

(2) That he can secure justice only in Laredo.

The first, if true, would be valid ground for a change of venue. The second is unique.

The Sixth Amendment to the Constitution demands that [fol. 45] the defendant be tried in the district or division where the crime was committed. If he believes prejudice to exist, Rule 21(a) permits defendant to waive this constiutional guarantee and ask for transfer to another District or Division where a fairer climate of opinion may exist. Neither the Constitution nor Rule 21(a) states that "venue in all cases shall be in the District or division wherein the defendant prefers to be tried." If that is what is meant by the Constitution and Rule, it would have been simple to say so.

Defendant seeks to make his perfect choice by alleging that prejudice exists, not only at Corpus Christi, but at

Houston, Galveston, Brownsville, and Victoria. Impliedly, prejudice exists in all other Texas cities, for defendant nowhere suggests that venue be transferred to another District. According to defendant, *only* at Laredo can twelve impartial jurors be selected.

2. The alleged prejudice is claimed to arise from two sources:

(1) Three Newspapers, and
(2) Investigation by Government Agents.

The Government opines that such prejudice does not exist so as to entitle defendant under Rule 21(a) to a transfer from the Corpus Christi Division. The Government further asserts that if so great a prejudice exists as alleged by defendant, and analyzing the defendant's own named sources and undeniable facts, similar prejudice must exist in the Victoria, Laredo, and Brownsville Division. Relying on defendant's alleged facts, the logical conclusion must [fol. 46] follow that the defendant can obtain a fair trial in the Houston or Galveston Division, or outside the Southern District of Texas.

3. The Government desires a fair trial. The defendant has filed numerous affidavits; in substance stating that because of widespread unfavorable publicity given the defendant in the Corpus Christi Caller, Corpus Christi Times, and La Verdad, the affiants do not believe that the defendant can secure a fair trial in Corpus Christi. Newspaper clippings, presumably of the publicity referred to in the affidavits, have been filed. If this Honorable Court believes that the effect of the newspaper publicity is so great as to bar a fair trial, then the Government requests, on the basis of a moral compulsion, that this cause be transferred from Corpus Chrisi—but not to Laredo, Victoria, or Brownsville, which are infected by exactly the same virus of newspaper publicity. This cause should be transferred to Houston, Galveston, or some point outside the Southern District, where, according to defendant's own facts and theory, a fair and impartial trial may be had. A transfer to secure a *fair* trial the Government does not oppose.

4. Defendant's claim that a fair trial can be obtained in Laredo, but nowhere else, is surprising because the alleged

prejudice in Corpus Christi is said to arise from the influence of three newspapers. The combined circulation of said newspapers proportionate to population in Laredo [fol. 47] is not only greater, but *enormously greater* than in Houston or Galveston Divisions (Govt. Exhibit "A", "B", and "C"). *Fifty-one times as many persons per thousand population read one of these three papers in Laredo as in Houston.* (25.5 and .5 per thousand, respectively, Exhibit "C"). *Twenty times* as many persons per thousand population read one of these three papers in Laredo as in Galveston (25.5 and 1.27 per thousand, respectively, Exhibit "C").

5. Furthermore, the circulation figures per thousand population show Victoria (27.8), Laredo (25.8), and Brownsville (17.), to be in the same intensity of influence. If the defendant's fear of the prejudice created by these three newspapers is factually true, then Brownsville, Laredo and Victoria should be equally unacceptable to him. Only in Houston (.5) and Galveston (1.27) is the total circulation of the three papers practically negligible.

6. If defendant is sincere in his belief that prejudice has been created by the three newspapers, and is only desirous of securing a fair trial, as stated to this Court, then defendant should seek a transfer to the Houston Division, where the alleged baleful influence of these newspapers is only 1/51 as strong as at Laredo. The defendant's continued insistence on a transfer to Laredo is incongruous with facts when viewed under the light of circulation and population.

7. The Government unequivocally denies all allegations made by the defendant in Paragraph II of his Amended Motion referring to various agents of the United States of [fol. 48] America as having blanketed the whole, or practically the whole, of entire Divisions other than Laredo within the Southern District of Texas. An investigation was made of defendant, naturally centering in his Division of residence. Ancillary investigation was conducted in every Division of this District, including Laredo. If investigation produces prejudice, which the Government does not admit, then prejudice exists at Laredo in the same degree as at Corpus Christi, Houston, Galveston, Brownsville, or Victoria.

8. The Government points out that Under Rule 21(a),

Federal Rules of Criminal Procedure, the defendant bears the burden of proving to the satisfaction of the Court, not merely that some prejudice may exist in the minds of some people, but that the prejudice against him in the Division is so great that he cannot obtain a fair and impartial trial. The test is not whether *some*, or even *many*, people can be found who claim to know that prejudice against the defendant exists. The *test* is whether twelve fair and impartial jurors can be selected in the Corpus Christi Division. The Government, therefore, denies both the accuracy and *relevancy* of the allegations as to prejudice contained in defendant's Application and the affidavits in support.

9. *Publicity in itself is not prejudice.* The very fact that defendant's attorneys were able to find many persons who willingly gave their affidavits to assist defendant to secure a change of venue indicates that the publicity has created in these people, not prejudice, but some *sympathy* for this defendant.

[fol. 49] Would the defendant accept any of these affiants as jurors? We think he would. They have shown a desire to be fair to defendant, and would doubtless give him a fair trial.

10. If the defendant can find persons who are willing to make affidavits asking that the defendant be given what they consider a "fair" trial, he can find twelve fair and impartial jurors in the Corpus Christi Division. If the Court fears that the wellsprings of fair thought and honest men's consciences have been so polluted by the media named by the defendant, then this Court should transfer this cause—not to Laredo, Victoria, or Brownsville, where the same stream of alleged prejudice condemned by defendant has unquestionably reached—but to some point untouched by the prejudice described by defendant.

Respectfully submitted, (Signed.) Malcolm R. Wilkey, United States Attorney, (Signed.) James T. Dowd, Assistant United States Attorney.

CERTIFICATE OF SERVICE

I hereby certify that this answer in opposition to motion has been served upon the defendant George B. Parr by delivering a true copy of same to the office of Marvin K.

Collie, Attorney of Record for Defendant Parr, Esperson Building, Houston, Texas.

(Signed) James T. Dowd, Assistant United States Attorney.

February, 1955.

[fol. 50] AFFIDAVIT

STATE OF TEXAS,
County of Nueces:

I, Santos De La Paz, Publisher, La Verdad, Corpus Christi, Texas, upon oath do depose and say as follows:

From the circulation records of La Verdad, which are kept under my direct supervision, the number of copies of La Verdad, net paid circulation, for the month of December, 1954, which were distributed in certain counties in Texas, is as follows:

County	La Verdad
Brazos	3
Colorado	2
Fayette	4
Grimes	6
Harris	23
Madison	3
Montgomery	4
Polk	2
San Jacinto	9
Trinity	2
Walker	4
Waller	3
Austin	40
Brazoria	3
Chambers	2
Fort Bend	2
Galveston	5
Matagorda	6
Wharton	10
Calhoun	12
Dewitt	6
Goliad	5
Jackson	2
Lavaca	6
Refugio	32
Victoria	20
Aransas	80
Bee	62
Brooks	8
Duval	954
Jim Wells	150

[fol. 51]

County	La Verdad
Kenedy	3
Kleberg	12
Live Oak	"
Nueces	600
San Patricio	32
Jim Hogg	25
LaSalle	3
McMullen	2
Webb	953
Zapata	35
Cameron	72
Hidalgo	63
Starr	125
Willacy	20

Subscribed and sworn to before me this — day of January, 1955. ——— ———, Notary Public in and for Nueces County, Texas.

STATE OF TEXAS,
County of Nueces:

I, Clayton Grant, Circulation Manager of the Corpus Christi Caller and Corpus Christi Times, Corpus Christi, Texas, upon oath do depose and say as follows:

From the circulation records of the Corpus Christi Caller and the Corpus Christi Times, which are kept under my direct supervision, the number of copies of each newspaper, net paid circulation, for the month of ———, 1954, which were distributed in certain counties in Texas, is as follows:

County	Morning Caller	Evening Times
Brazos	Less than 25	Less than 25
Colorado	" " "	" " "
Fayette	" " "	" " "
Grimes	" " "	" " "

[fol. 52]

Harris	Less than 48	Less than 2
Madison	Less than 25	Less than 25
Montgomery	" " "	" " "
Polk	" " "	" " "
San Jacinto	" " "	" " "
Trinity	" " "	" " "
Walker	" " "	" " "
Austin	" " "	" " "
Brazoria	" " "	" " "
Chambers	" " "	" " "
Fort Bend	" " "	" " "
Galveston	" " "	" " "
Matagorda	" " "	" " "
Wharton	" " "	" " "
Calhoun	Less than 248	Less than 37
Dewitt	101	None

County	Morning Caller	Evening Times
Goliad	182	10
Jackson	5	None
Lavaca	Less than 25	Less than 25
Refugio	1,389	255
Victoria	780	85
Aransas	374	321
Bee	1,379	195
Brooks	720	160
Duval	1,102	308
Jim Wells	2,585	673
Kenedy	17	None
Kleberg	2,599	1,833
Live Oak	446	
Nueces County	32,143	29,982
Patricio	3,038	2,196
Jim Hogg	240	None
LaSalle	Less than 25	Less than 25
McMullen	12	None
Webb	569	None
Zapata	23	"
Cameron	1,837	"
Hidalgo	2,469	"
Starr	262	"
Willacy	593	"

Subscribed and sworn to before me this — day of January, 1955. ———, Notary Public in and for Nueces County, Texas.

[fol. 53]

Population		Circulation Corpus Christi Morning Caller	Circulation Per 1,000	Circulation Corpus Christi Evening Times	Circulation Per 1,000	Circulation La Verdad	Circulation Per 1,000	Total Circulation Per 1,000 (Ignoring Duplication)
Houston Division								
Brazos	38,390	20		20		3		
Colorado	17,576	20		20		2		
Fayette	24,176	20		20		4		
Grimes	15,135	20		20		6		
Harris	806,701	48		2		23		
Madison	7,996	20		20		3		
Montgomery	24,504	20		20		4		
Polk	16,194	20		20		2		
San Jacinto	7,172	20		20		9		
Trinity	10,040	20		20		2		
Walker	20,163	20		20		4		
Waller	11,961					3		
	1,000,008	248	24	202	20	65	06	50
Galveston Division								
Austin	14,663	20		20		40		
Brazoria	46,549	20		20		3		
Chambers	7,871	20		20		2		
Fort Bend	31,056	20		20		2		
Galveston	113,066	20		20		5		
Matagorda	21,559	20		20		6		
Wharton	36,077	20		20		10		
	270,841	140	51	140	51	68	25	1 3
Victoria Division								
Calhoun	9,222	248		37		12		
DeWitt	22,973	101				6		
Goliad	6,219	182		10		5		
Jackson	12,916	5				2		
Lavaca	22,159	20		20		6		
Refugio	10,113	1,389		255		32		
Victoria	31,241	780		85		20		
	114,843	2,725	23 8	407	3 8	83	72	28 3

[fol. 54]

Corpus Christi Division									
Aransas	4,252	374		321		80			
Bee	18,174	1,379		195		62			
Brooks	9,195	720		160		8			
Duval	15,643	1,102		308		954			
Jim Wells	27,991	2,585		673		150			
Kenedy	632	17				3			
Kleberg	21,991	2,599		1,833		12			
Live Oak	9,054	445				7			
San Patricio	35,842	4,038		2,196		30			
Nueces	165,472	32,143		29,982		600			
	308,245	45,403	147	35,668	116	1,906	6.17	269.2	
Laredo Division									
Jim Hogg	5,389	240				25			
LaSalle	7,485	20		20		3			
McMullen	1,187	12				2			
Webb	56,141	569				953			
Zapata	4,405	23				35			
	74,607	864	11.6	20	.26	1,018	13.64	25.5	
Brownsville Division									
Cameron	125,170	1,837				72			
Hidalgo	160,446	2,469				63			
Starr	13,948	262				125			
Willacy	20,920	593				20			
	320,484	5,161	16.1			280	87	17	

ORDER ALLOWING CERTIORARI—Filed October 17, 1955

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case will be heard on the merits and on the question of appealability.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(5790-1)